(26,313)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 846.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

EDWIN J. HILT, JR., AN INFANT, BY HIS NEXT FRIEND, AND EDWIN J. HILT, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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United States District Court, District of New Jersey.

EDWIN J. HILT, JR., AN INFANT BY NEXT FRIEND, AND EDWIN J. HILT, SR., *vs.* ERIE RAILROAD COMPANY. } At Law.

Docket Entries.

1916,	Nov.	20.	Summons issued.
"	"	24.	Summons and Complaint returned, served Nov. 23, and filed.
"	"	21.	Petition and Order appointing next friend filed.
"	Dec.	5.	Answer filed.
1917,	Jan.	10.	Reply filed.
"	"	10.	Notice of Trial filed.
"	Mar.	7.	Notice of Attorneys Lien filed.
"	June	27.	Trial.
"	"	28.	Trial.
"	"	29.	Trial. Verdict for Edwin Hilt, Jr., $25,000; Edwin Hilt, Sr., $1,500.
"	"	29.	Rule to Show Cause why verdict should not be set aside and new trial granted filed.
"	July	12.	Proof of Service of Rule to Show Cause filed.
"	"	16.	Reasons on application for new trial filed.
"	"	16.	Affidavit of Service filed.
"	"	23.	Hearing on Rule to Show Cause why verdict should not be set aside and new trial granted. Ordered that verdict for Edwin Hilt, Jr., be reduced to $10,000, or new trial granted.
"	"	28.	Conclusions filed.

1917,	Aug.	1,	Rule on Application for New Trial filed.
"	"	7.	Consent to Reduction of Verdict filed.
"	"	10.	Rule for Judgment Final for plaintiffs, for Edwin J. Hilt, Jr., $10,000, and Edwin J. Hilt, Sr., $1,500, and costs, filed.
"	"	28.	Plaintiff's Costs taxed at $83.90 and filed.
"	"	"	Bill of Exceptions filed.
"	"	"	Assignment of Errors filed.
"	"	"	Petition for Writ of Error filed.
"	"	"	Order allowing Writ of Error filed.
"	"	"	Stipulation for Bond filed.
"	"	"	Bond on Writ of Error filed.
"	"	"	Writ of Error issued. Copy filed.
"	Sept.	4.	Citation issued.
"	"	"	Order allowing Defendant's Attorney to take Bill of Exceptions filed.

United States District Court, District of New Jersey.

EDWIN J. HILT, JR., BY NEXT FRIEND, AND EDWIN J. HILT, SR.,
vs.
ERIE RAILROAD COMPANY.
} At Law.

Judgment.

August 10, 1917. Judgment for plaintiffs, Edwin J. Hilt, Jr., ten thousand dollars, and Edwin J. Hilt, Sr., fifteen hundred dollars and costs.

Damages, Edwin J. Hilt, Jr., $10,000.00
" Edwin J. Hilt, Sr., 1,500.00
Costs

Judgment signed,
THOMAS G. HAIGHT,
Judge.

Complaint.

(*Filed November 24, 1916.*)

The plaintiffs' complaint of the defendant is as follows:

First Count.

1. The plaintiffs are residents and citizens of the State of New Jersey, residing at Garfield in said State, and the defendant is a corporation of the State of New York.

2. That defendant is the owner and manager of, and operates and controls, a line or lines of steam railroad with the necessary land, road-bed, tracks, stations, sidings,

engines, cars and equipment thereto appertaining, through the States of Pennsylvania, New Jersey and elsewhere, and in particular in and through the Borough of Garfield, New Jersey.

3. That on or about the fifth day of April, 1916, defendant being so possessed and having the management and control of said lands, railroad tracks, engines, cars, etc., in said Borough of Garfield, New Jersey, so negligently, carelessly and improperly conducted itself as to injure the infant plaintiff herein, so that he lost his left leg.

4. The negligence of the defendant consisted in this:

(a) That on the day above mentioned and long prior thereto, defendant possessed, managed and maintained lands, railroad tracks and sidings upon which it operated engines and cars in close proximity to a public highway and roadway, upon land, unenclosed by fences or otherwise, whereon it invited and permitted children of tender years, and particularly the infant plaintiff herein, to play, without taking or exercising reasonable care to avoid injuring them.

(b) That on the day above mentioned and long prior thereto, defendant kept and maintained upon such lands, railroad tracks and sidings during the daytime freight cars and other cars, and permitted children of tender years, and particularly the infant plaintiff herein, to play in and upon the said lands, railroad tracks, sidings and freight cars and other cars without taking or exercising reasonable care to avoid injuring them.

(c) That on the day above mentioned and long prior thereto, defendant, well knowing said roadway, railroad tracks, lands and sidings and the freight cars and other cars thereupon were located in the immediate vicinity of numerous dwellings and were attractive to children of tender years, and with full knowledge of the dangers to which such children were exposed, invited and permitted

children of tender years, and particularly the infant plaintiff herein, to play in and upon said lands, railroad tracks, sidings, freight cars and other cars without taking or exercising reasonable care to avoid injuring them.

(d) That on the day above mentioned, defendant, well knowing that children of tender years, and particularly the plaintiff, were playing in and upon said roadway, lands, sidings, tracks, freight cars and other cars, ran and propelled, or caused to be run and propelled, certain engine or cars into and upon said roadway, siding, tracks and lands without warning said children and particularly the plaintiff of the approach thereof.

5. That by reason of the negligence of the defendant as aforesaid, plaintiff, Edwin J. Hilt, Jr., an infant, of the age of six years, while together with other little children playing upon or about said lands, roadway, siding, tracks and freight cars or other cars to the knowledge of the defendant and its employees, was by a car or cars of said defendant, pushed or propelled by a steam engine upon said siding or tracks aforesaid, run into and upon and thrown to the ground with great force and violence and run over thereby, injuring him so that his left leg was crushed, torn and mangled above the knee, so that the same had to be amputated.

6. By reason thereof said plaintiff, Edwin J. Hilt, Jr., suffered great pain and agony and was and hereafter will be crippled and disfigured for life and unable to procure employment and disabled from earning a livelihood.

Wherefore plaintiff, Edwin J. Hilt, Jr., demands as damages fifty thousand dollars ($50,000).

Second Count.

Edwin J. Hilt, Sr., plaintiff, for a separate cause of action against said defendant, complains:

1. He makes paragraphs 1, 2, 3, 4, 5 and 6 of the First Count of this complaint paragraphs 1, 2, 3, 4, 5 and 6 of this count.

2. He says said infant, Edwin J. Hilt, Jr., is his son and child.

3. That by reason of the negligence of defendant as aforesaid, and the injury to his said son and child, he has lost the services of said son and child, and was compelled to lay out and expend, and will in the future be compelled to lay out and expend, large sums of money in endeavoring to cure his said son and child of his injuries, and in the purchase of artificial limbs and for other expenses.

Wherefore, he demands as damages five thousand dollars ($5,000).

SAMUEL GREENSTONE,
Attorney of Plaintiff.

Answer.

(*Filed December 5, 1916.*)

Defendant, ERIE RAILROAD COMPANY, a corporation of the State of New York, having its principal office in the State of New Jersey, at the foot of Pavonia Avenue, Jersey City, says that:

First Defense to First Count.

1. It has no knowledge nor information sufficient to form a belief as to the allegations of paragraph one, except that it denies that it is a corporation of the State of Pennsylvania, and says that it is a corporation of the State of New York.

2. It admits the allegations of paragraph two.

3. It denies the allegations of paragraphs three and four.

4. It denies the allegations of paragraph five, except that it admits that upon said day plaintiff, Edwin J. Hilt, Jr., sustained certain injuries.

5. It has no knowledge nor information sufficient to form a belief as to the allegations of paragraph six, except that it denies that the said Edwin J. Hilt, Jr., as a result of said accident will be unable to procure employment and disabled from earning a livelihood.

Second Defense to First Count.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr.

Third Defense to First Count.

Plaintiff, Edwin J. Hilt, Jr., was a trespasser on the property of the defendant. Defendant did not violate its legal duty to the said plaintiff as such trespasser.

Fourth Defense to First Count.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr., in walking, standing or playing on the defendant's railroad.

Fifth Defense to First Count.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr., in failing to take reasonable care to look, listen or otherwise inform himself of the approach of the train by which he was struck.

Sixth Defense to First Count.

Plaintiff, Edwin J. Hilt, Jr., was injured by an engine, or car, while walking, standing or playing on a railroad in violation of Section 55 of an Act entitled "An Act concerning railroads (Revision of 1903)," approved April 14, 1903.

Seventh Defense to First Count.

Plaintiff, Edwin J. Hilt, Jr., was injured by an accident while he was violating a statute of the State of New Jersey, to wit, Section 214 of an act entitled "An Act for the punishment of crimes (Revision of 1898)," being Chapter 235 of the Laws of 1908, in that he was trespassing upon the railroad of this defendant.

First Defense to Second Count.

1. Defendant reiterates and makes a part hereof the first defense to first count.

2. It has no knowledge nor information sufficient to form a belief as to the allegations of paragraph two.

3. It denies the allegations of paragraph three.

Second Defense to Second Count.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr.

Third Defense to Second Count.

Plaintiff, Edwin J. Hilt, Jr., was a trespasser on the property of the defendant. Defendant did not violate its legal duty to the said plaintiff as such trespasser.

Fourth Defense to Second Count.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr., in walking, standing or playing on the defendant's railroad.

Fifth Defense to Second Count.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr., in failing to take reasonable care to look, listen or otherwise inform himself of the approach of the train by which he was struck.

Sixth Defense to Second Count.

Plaintiff, Edwin J. Hilt, Jr., was injured by an engine, or car, while walking, standing or playing on a railroad in violation of Section 55 of an Act entitled "An Act concerning railroads (Revision of 1903)," approved April 14, 1903.

Seventh Defense to Second Count.

Plaintiff, Edwin J. Hilt, Jr., was injured by an accident while he was violating a statute of the State of New Jersey, to wit, Section 214 of an act entitled "An Act for the punishment of crimes (Revision of 1898)," being Chapter 235 of the Laws of 1908, in that he was trespassing upon the railroad of this defendant.

Eighth Defense to Second Count.

1. The defendant reiterates and makes a part hereof the first, second, third, fourth, fifth, sixth and seventh defenses to the second count.

2. Said negligence of the plaintiff, Edwin J. Hilt, Jr., is attributable to the plaintiff, Edwin J. Hilt, Sr.

Ninth Defense to Second Count.

The accident set forth in the complaint was due to contributory negligence on the part of the said Edwin J. Hilt, Sr.

Tenth Defense to Second Count.

10

The accident set forth in the complaint was due to contributory negligence on the part of the said Edwin J. Hilt, Sr., in knowingly permitting and allowing the said plaintiff, Edwin J. Hilt, Jr., to be in a position of obvious danger.

Eleventh Defense to Second Count.

The accident set forth in the complaint was due to contributory negligence on the part of Edwin J. Hilt, Sr., in
20 failing to look, listen or otherwise inform himself of the approach of the said train, knowing that the said Edwin J. Hilt, Jr., was in a position of obvious danger.

COLLINS & CORBIN,
Attorneys of Defendant.

Reply.

30 (*Filed January 10, 1917.*)

The plaintiff, Edwin J. Hilt, Jr., replies to the answer of the defendant, as follows:

1st. He denies the allegations of contributory negligence, trespassing, and other defenses of affirmative nature set forth in the defenses of said answer.

2d. He says further that he was an infant *non sui juris,* six and one-half years old, at the time of the accident complained of.

3d. He denies the application of the statutes pleaded in said defenses to the issue at bar.

The plaintiff, Edwin J. Hilt, Sr., replies to the defenses pleaded in the answer of the defendant, as follows:

1st. The plaintiff, Edwin J. Hilt, Sr., denies the defenses set forth in the answer of the defendant of contributory negligence, imputation of negligence, trespassing, and other defenses of affirmative nature pleaded as therein set forth.

2d. The plaintiff further says that his son was an infant *non sui juris,* six and one-half years old at the time of the accident complained of.

3d. The plaintiff denies the application of the statutes pleaded in said defenses to the issue at bar.

The plaintiffs admit that the Erie Railroad Company is a corporation of the State of New York.

SAMUEL GREENSTONE,
Attorney of Plaintiffs.

Bill of Exceptions.

(*Filed August 28, 1917.*)

Appearances—SAMUEL GREENSTONE, Attorney for the Plaintiff; MESSRS. COLLINS & CORBIN (MR. BAIN and MR. HOBART), appearing for the Defendant.

Testimony taken upon a trial in the above-entitled matter before the Hon. Thomas G. Haight and a Jury at the Post Office Building in Newark, New Jersey, on Wednesday, June 27, 1917.

Mr. Greenstone—I move to amend that part of the pleadings and complaint which says that the Erie Railroad Company is a corporation of the State of Pennsylvania, that was an inadvertence.

The Court—Ought to be New York.

Mr. Bain—No objection. It is admitted in the answer it is a corporation of New York.

The Court—The amendment will be made.

(Mr. Greenstone opens to the jury.)

Recess.

AFTERNOON SESSION.

The Court—If there is a map it had better be put on the easel.

Mr. Greenstone—I have here the original engineer's map of the borough.

The Court—Mr. Bain has probably got a map which is better.

Mr. Bain—This is made from actual survey.

The Court—There is nothing binding on you at the present time until it is proven unless you take it. I merely want them to have something to enable them to follow the evidence.

(Mr. Bain opens to the jury.)

EDWIN J. HILT, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Mr. Hilt, are you the father of Edwin Hilt here?

A. Yes, sir.

Q. 2. This boy? A. Yes, sir.

Q. 3. Where do you live?

A. 96 Palisade Avenue, Garfield, N. J.

Q. 4. How long have you lived there?

A. Close on to the neighborhood of four years; it will be four years this coming April.

Q. 5. And how long have you lived in Garfield, altogether about? A. About sixteen years.

Q. 6. What is your age?

A. Fifty-five last birthday, the 28th of January last.

Q. 7. What is your occupation? A. Engineer.

Q. 8. Are you the plaintiff also and suing for the loss of services in this action for your boy? A. I am.

Q. 9. And you are suing also as next friend for your boy?

A. I am.

Q. 10. What happened to your boy, if you know, on April 5, 1916?

Mr. Bain—I object unless the witness was present, and it does not appear that he was.

The Court—I suppose he can testify as to what condition he saw his boy in. Did you see the accident, Mr. Hilt?

The Witness—No, I did not.

The Court—You saw the boy when?

The Witness—Not until the day afterwards.

The Court—And then you saw him injured?

The Witness—In bed.

Q. 11. Now, you can state what the injuries were that you saw that he had?

A. Well, I couldn't really state at the time; if it happened right now over again I couldn't state how the boy was injured, because he had two pieces under his leg and it looked like the leg was only off up to there (indicating), and the doctor that first operated on his leg, he did leave so much of his foot, from the ankle up to the end of the leg was four inches, and I thought that that was all that was taken off, but in the hospital they dressed his leg and put a board on top and a board underneath, and while he was lying in bed it just looked as if that was all that was gone off the leg. I really did not know anything about how far the limb was gone until he was getting dressed for me to take him home a month after.

By the COURT.

Q. 12. Then you found the limb was gone to what extent?

A. Up above the knee; he only has about three inches of the stump now. I asked the hospital authorities—

Q. 13. That's all.

By Mr. GREENSTONE.

Q. 14. Do you know who operated on your boy?

A. Dr. Dave Crounse.

Q. 15. Is he your physician, do you know?

A. My physician, no. I believe he is the Erie Railroad physician.

Mr. Bain—I object to what the witness believes.

Q. 16. Well, do you know whether he is the Erie Railroad physician? If you don't know say so.

Mr. Bain—I object unless the source of the knowledge appears.

The Court—You don't know, do you?

The Witness—From what the Erie Railroad people says I do know, otherwise I don't.

The Court—All right, you can call him. No use wasting time trying to prove it in this way.

Q. 17. Who was the physician that first operated on your boy? A. Dr. Edward J. Reed.

Q. 18. Who was he, your physician? A. Yes, sir.

Q. 19. How old was your son at the time of this accident? A. A little bit over six years old.

Q. 20. Well, about how many months beyond six years?

A. Five and a half to six months.

The Court—Over six years.

The Witness—He was over six, going on to his seventh year; it must be six years and five months or five and a half or six months.

The Court—When did this accident happen?

Mr. Greenstone—April 5, 1916.

The Witness—The 5th day of April.

Q. 21. Do you know this place where your boy was injured? A. Yes.

Q. 22. How long have you known this place about?

A. Well, this last fourteen years.

Q. 23. Have you ever seen children play there? A. Yes.

Q. 24. About how often have you see children playing around there? A. Well, close on to daily this last ten years.

Q. 25. Did you see any crew, members of the crew working around while children were playing around there?

A. Yes, sir.

Q. 26. And who else besides members of the crew—the railroad employees, if you know?

Mr. Bain—I object, if your Honor please, to what happened on other occasions so far as the crew are concerned; that is not evidence of what happened at the time of this immediate accident.

The Court—I understand that, but it may be the testimony upon which the duty on the part of the railroad company arises, I think, therefore, it is proper.

Mr. Bain—My point is this your Honor: Suppose ten years ago the railroad employees were not in the habit of chasing children away.

The Court—He says he has seen children for ten years playing there. He has seen railroad crews around there; has seen other railroad employees around there. Now, if for a period of time for ten years they have allowed this to go on, then if other essentials are present, there would a duty arise on the part of the railroad company.

Mr. Bain—But the question is not specific, any particular time, nor has plaintiff's counsel called the

witness' attention to any particular time as to which he is now testifying.

The Court—Now I understand, Mr. Hilt, that you have seen children play there for ten years up to the time this little boy was injured?

The Witness—And since.

The Court—And your say that was almost a daily occurrence?

The Witness—Yes, sir.

The Court—Now, during that ten years have you seen railroad employees around there at the time you have seen children playing?

The Witness—Yes.

The Court—And how frequently seen railroad employes there on those occasions?

The Witness—Well, every time—every time that I have saw the children playing there I have seen the man on the crossing. I have also seen the section foreman and also the man in the depot.

The Court—Have you seen train crews around there at that time?

The Witness—Yes.

The Court—How frequently?

The Witness—Now, I couldn't say that exactly, that is to take an oath on that, but I should say—

The Court—Was it as frequently as the other men that you have seen there?

The Witness—Yes, just as frequently.

The Court—Then it was almost a daily occurrence?

The Witness—Almost a daily occurrence, almost every day in the year.

The Court—And were the children there at those times?

The Witness—Yes.

The Court—Now, then, you may proceed.

Q. 27. Describe this locality where your boy was injured as near as possible.

A. Shall I show it on the map? I am not very good at describing it.

Q. 28. Yes, come down and take this pointer and show us. A. This is the freight station—this is supposed to be the bumper right here.

Mr. Bain—I object to any supposition.

The Court—Well, state what it is.

The Witness—The spot where he was hurt.

Q. 29. No, just point out and state what these objects are.

A. This is an open space between this underground crossing up to this here dwelling on this side of the street, the open space. (Witness indicates the place on the east side of the street marked Passaic Street and north of the street marked Bogart Avenue, extending to a place where there is indicated on the map three dwelling houses.)

The Court—Is that right?

The Witness—That's the point, yes, sir.

The Court—Now then, in that space the witness indicates a freight station and the end of the track.

The Witness—There is nothing here to prevent any child, man or woman, it don't make no difference, from going from here up on that track.

(Witness indicates from Bogart Avenue to the open space and the track beyond.)

Q. 30. Now, is there a driveway from Bogart Avenue up to the crossing? A. Yes, three.

Q. 31. Just point out this particular driveway.

The Court—What crossing?

The Witness—The crossing at the further end.

The Court—What do you mean, the east end?

The Witness—The east end.

A. There is three on Bogart Avenue and one on Hobart Place coming in to this here same place, and three different driveways.

The Court—Where is there any crossing other than at Passaic?

The Witness—That is underhead.

Q. 32. Point out where the Hobart Place crossing is.

A. That is over here. (Indicating the right of the map.)

Q. 33. Now, you say there is a crossing at Hobart Place to the east of where the tracks are shown on the map as ending? A. Yes.

Mr. Bain—The map oes not show the tracks as ending.

The Witness—That's the end of the tracks as appear on the map.

Mr. Bain—The tracks as they appear on the map extend somewhat to the east of Hobart Place.

The Court—Now, the question is are there any driveways leading from where?

Q. 34. From Bogart Avenue by this freight house to Hobart Place? A. Yes.

Q. 35. Point out.

A. One right here and one right here close up against the fence.

The Court—Indicating three places on the open space leading from Bogart Avenue into the open space.

The Witness—Into the switch.

Q. 36. By open space do you mean the space between the fence line of houses abutting up towards the switch?

A. No, I mean the open space between the railroad track and the street. There is nothing there.

Q. 37. Well, as to this driveway, does that lead between the fence of the houses and the switch up to this Hobart Place Crossing?

A. After you leave this third one, yes; that goes into the driveway between the fence and the switch track? That is a driveway leads down to Hobart Place.

Q. 38. Now, how many houses, Mr. Hilt, can you point out are on Bogart Avenue?

The Court—What do you mean?

Q. 39. On that block between Bogart Place and Passaic Street, on that side? A. On the side the switch is on?

Q. 40. Yes. A. These houses.

The Court—What do you mean by that, that these houses extend along that fence?

The Witness—The back of the houses faces the switch; the front of the houses faces Bogart Avenue.

The Court—Then there are six houses on Bogart Avenue between the fence next to the open space and Hobart Avenue?

The Witness—Between the fence and Hobart Avenue.

The Court—But facing on Bogart?

The Witness—Facing on Bogart and the back of them up against the fence.

The Court—Well, against the fence, that is between the switch and the road or the driveway, is that right?

Q. 41. This fence—

The Court—Well, now, wait a minute, I understand that there is a driveway between the fence and the switch leading from this space to Hobart Avenue.

The Witness—And there is no driveway between the fence and the switch, but there is a fence goes up just about like that. Here is your switch; now there is a driveway right in here, and this fence comes up this way. There is six houses between

here and Hobart Place. Now, that's a driveway leading in here, but from here to Passaic Street there is nothing; empty spot.

The Court—I understand, but isn't there a fence extending along that driveway?

The Witness—Yes, from where it starts.

The Court—It starts from Hobart Place, doesn't it?

The Witness—Yes.

The Court—And extends westerly to another fence which separates the open space from the place where the houses are located?

The Witness—Exactly.

The Court—And that driveway is between the switch and the fence I have just described, is that right?

The Witness—Yes.

The Court—Just indicate where that fence is.

The Witness—That fence would run right about there from Bogart Avenue and runs right along.

(Indicating the two lines marked on the map by the word "fence.")

The Court—Now, those houses that back up there are located on the corner of Bogart Avenue and back up on the fence that you have just spoken about.

The Witness—Yes.

Q. 42. Now, was your boy in good physical health before he was injured?

Mr. Bain—I object.

The Court—Why?

Mr. Bain—Calling for a conclusion.

The Court—Oh, I think he may testify to that.

Mr. Bain—How could he know whether he had heart trouble or something of that kind?

The Court—He wouldn't, but he can testify as best he may; a layman can testify to that as far as he can say.

Defendant's counsel asks an exception, which is hereby allowed and sealed accordingly.

[L. S.]

Mr. Greenstone—I withdraw that question, your Honor.

The Court—All right.

Q. 43. From what you know of your boy, was he apparently all right, in good health and able to be about?

A. Yes.

Q. 44. Before he was injured?

A. Yes, I could trust him with anything.

Q. 45. Did you send him to the stores to do errands for you? A. I didn't, but my wife did.

Q. 46. Well, would he do some errands for you?

A. Always.

Q. 47. Whenever you would request his services would he accomplish it? A. And willingly.

Q. 48. Can he do those services for you now?

A. No, he cannot do now because he can't carry anything.

The Court—Was the boy at school?

The Witness—At that time, yes, sir; he only had been out of school a little over half an hour when he was hurt.

The Court—How long had he been going to school?

The Witness—He went last February a year ago, and he had been going to school.

The Court—February, 1916?

The Witness—Yes, he had been going to school about two and one-half months or three months.

Q. 49. Mr. Hilt, what did you expect to bring up your boy to, what profession or trade?

Mr. Bain—I object to that if your Honor please, entirely immaterial what he intended the boy to do.

The Court—No, that may reflect upon the question; of course it is not absolutely certain, but it reflects on the question of what service he would have been to the father.

Defendant's counsel asks an exception, which is hereby allowed and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

Q. 50. Answer that.

A. I intended to bring him up same as his father.

The Court—Fireman.

The Witness—Engineer.

Q. 51. What sort of engineer?

The Court—All right, as long as you weren't going to bring him up as a lawyer it would be all right.

The Witness—Well, Judge, your Honor, I think we have got enough the way it is; we need some mechanics and recruits; I intended to bring him up as an engineer same as his father.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 52. How far do you live from the place where the boy was hurt? A. About four blocks, about four squares.

Q. 53. How many times a day during the past ten years did you go down to the place where the boy was hurt?

A. Six years straight daily, twice a day.

Q. 54. What time of the day?

A. Early in the morning and five o'clock in the afternoon.

Q. 55. How early in the morning?

A. Four o'clock in the morning, five in the afternoon.

Q. 56. You say you went past that place at the hours you have mentioned for how many years past?

A. Pretty near six years.

Q. 57. Those are the only times you passed the place where the boy was hurt? A. Not at all.

Q. 58. What other hours of the day would you pass that place?

A. Any time after five o'clock in the afternoon to ten o'clock at night, going up to the saloon for a pint of beer. I had that boy when he was a baby.

Q. 59. You mean you sent your boy for beer when he was a baby? A. I didn't say anything of the kind.

Q. 60. What did you say?

A. I say many times I have taken that boy when he was a baby for a pint of beer.

Q. 61. That is you would go for a pint of beer and carry him with you? A. Carry him in my arms.

Q. 62. How old was he then, three or four years old?

A. No, eighteen months old, he wasn't a year; he was born and raised there close to Hobart Place.

Q. 63. Would you take the boy into the saloon with you?

A. Yes, sir.

Q. 64. How long did you continue to do that?

A. Oh, I didn't continue to do that very long because the wife wouldn't stand for it.

Q. 65. Now, how many days in the month or days in the year would you go past the place where the boy was hurt in the evening after five o'clock?

A. Well, I guess it was pretty near four nights a week.

Q. 66. Four nights a week you went down for your beer?

A. No, I didn't say that; four nights a week I passed that one certain point, either going to the fire house or going up town of Passaic.

Q. 67. And what time was it that you would pass the place in the evening after five o'clock, what hour?

A. Sometimes half-past five, sometimes not until seven o'clock, sometimes not until eight o'clock, sometimes I

would just stop in the house and get right out again, no particular time.

Q. 68. But you never went past the place between eight o'clock in the morning and three o'clock in the afternoon?

A. Oh, yes.

Q. 69. How many times?

A. Well, I cannot say that, because I wasn't working all the time, and I wasn't out of work all the time neither.

Q. 70. Well, about how many times a year would you go past the place in between those hours?

A. Maybe two dozen times, maybe more.

Q. 71. Two dozen times in a year? A. Maybe more.

Q. 72. You never saw any children around the freight house or the switch shown on the map as early as four o'clock in the morning? A. No, I didn't say that.

Q. 73. And how many times would you see children in that vicinity in the evening? A. Quite frequently.

Q. 74. Well, how frequently?

A. Well, almost every evening you go there at five o'clock at night.

Q. 75. How many times in a month or year?

A. It is a daily occurrence.

Q. 76. You didn't go down there every day after five o'clock in the evening? A. I didn't say I did.

Q. 77. How many days in the month or year did you see children in the neighborhood of the switch at Garfield after five o'clock in the afternoon?

A. I worked five and a half days a week, came home at five o'clock in the afternoon. I come home Saturdays at, maybe, one o'clock, maybe quarter after twelve, maybe half past twelve I see them there; then, I see them there around a Sunday. I seen them there for a period of years, I see them there to-day.

Q. 78. How many times in a month or a year did you actually see children in the neighborhood of the freight

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house or the switch in Garfield after four o'clock in the afternoon?

A. Well, I will say, a rough estimation, about 200 times a year.

Q. 79. Then, you went by there 200 times a year after four o'clock in the afternoon? A. Yes.

Q. 80. Sometimes it was to get beer, sometimes to go to the fire house, that you went by there?

A. Sometimes I didn't have the price of the beer and I went by anyhow.

Q. 81. Where was the station agent when you went by in the afternoon or evening?

A. You got me guessing, I don't know where he was; he may have been in the depot or he may have been fast asleep, the same as they have got their detectives up there half the time.

Q. 82. You didn't see the station agent?

A. No, I did not.

Q. 83. You say that he may have been asleep?

A. May have been.

Q. 84. You are simply guessing at something you don't know any thing about?

A. I am just making a fair, square statement; he may have been the same as I have seen the railroad detectives.

Q. 85. Never mind that, Mr. Hilt, you don't know where the station agent was? A. I do not.

Q. 86. Where was the crossing flagman at the time you went by the place after four o'clock?

A. They could not see them children playing, either one of the crossing flagmen.

Q. 87. Couldn't see the children? A. No.

Q. 88. Why not?

A. Because that man on Hobart Place is on a curve. The man on Somerset Place cannot see any further than the depot, and the man on Hobart Place cannot see two car lengths outside of the switch.

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Q. 89. So that the flagmen on the crossings east and west of the switch couldn't see the children that you have mentioned? A. No.

Q. 90. Who were around the place? A. No.

Q. 91. Where were there any train crews at the times you went by the place?

A. I seen them drilling in there of a Saturday afternoon when children was playing there.

Q. 92. Now, how many times did you see drill crews around on Saturday afternoon?

A. Well, to my certain knowledge, eight or ten times.

Q. 93. During a period of ten years?

A. No, I won't say that long, but within this last five years.

Q. 94. Eight or ten times you say you saw freight crews around during five years?

A. No, about the time that little fellow was born I used to go out and talk to the train crews when they were switching there of a Saturday afternoon, that little boy was only about six or seven months old at that time, when he was seven and a half years old now, that is so long ago. Well, since that I have saw them practically almost every Saturday when I wouldn't be working, I saw that train crew drilling in and out, either at Hammerslacks or that particular switch.

Q. 95. You mean to say on Saturday afternoons you saw freight crews drilling cars in and out of the switch?

A. Yes, sir.

Q. 96. That is the switch on the map? Where were the children, then, you say?

A. In between picking coal and on top.

The Court—What do you mean by in between?

The Witness—Playing brakeman, flagman and conductor.

The Court—In between the cars?

The Witness—Yes.

Q. 97. That is the brakemen were in between the cars?

A. No, the children.

Q. 98. During the time that the cars were being pushed back and forth? A. Yes.

Q. 99. You mean to say that cars were moved with the children in between them? A. Yes, sir.

Q. 100. How do you account for the fact none of them were hurt?

A. Because they were a little too foxy to get caught; they were older than this boy; I am not talking about tots, I am talking about children eight, nine, ten years old.

Q. 101. In other words, the other children took a chance of being hurt? A. They took the chance.

Q. 102. Will you please state exactly where the children were when you saw them? A. On the cars on the switch.

Mr. Greenstone—Now, the last juror cannot hear you, Mr. Hilt.

Q. 103. What was the last time, previous to the accident to your boy, that you saw any children in or near the switch shown on the map?

A. The Saturday noon before he was hurt.

Q. 104. What time of day was that?

A. Well, I guess it was pretty near—we are all acquainted with the noon hour; Saturday noon before he was hurt I come up across that there from Rutherford, right straight up the short cut home.

Q. 105. Were you there during the whole noon hour?

A. I didn't say that, I said I come up at noon hour right by that switch and seen the children playing on that switch at that time.

Q. 106. How long did you stay there?

A. I didn't stay there, I went right on through, tried to chase them away.

Q. 107. You tried to chase them away?

A. Yes. I had no authority to do it.

Q. 108. Others tried to chase them away, didn't they?

A. No, sir.

Q. 109. Never?

A. I won't say that, but I never seen the railroad men try to chase them away.

Q. 110. Who did you see try to chase them away?

A. Citizens around the town.

Q. 111. Citizens tried to chase them away?

A. Yes, sir; also the chief of the police department.

Q. 112. So that somebody did try to prevent the children from using that place as a playground?

A. Not all the time, only just when they would happen to be there and notice it.

Q. 113. You knew the place was dangerous for children to play in?

A. Well, but that don't say because I knew it—

Q. 114. Just answer the question? A. Yes.

Q. 115. You knew it was a dangerous place for your boy to play in and around, didn't you?

A. I never knew that my boy ever played there until he was hurt.

Q. 116. But you knew it was a dangerous place for your boy to play in and around, didn't you?

A. But I never knew he played there.

Mr. Greenstone—Just answer the question, that's all you need to do.

Q. 117. How many times were you in the neighborhood of the switch shown on the map during the period of the day when school was in session?

A. When school was in session?

Q. 118. Yes.

A. Well, it depends a great deal on whether I was working. I am a construction engineer, I work on buildings, I work on boats, I work one place, it may last two or

three months, may last a year, may last two or three years, then all of a sudden I am out and I have to work in a different neighborhood; my hours is different on the boat than it would be ashore.

Q. 119. Well, were you ever in the vicinity of the switch at Garfield, shown on the map, during the period when public school was in session? A. Yes.

Q. 120. How many times?

A. I worked for over two years right on that there switch unloading a boat.

Q. 121. And did you see any children there? A. Yes.

Q. 122. During the time school was in session?

A. Yes.

Q. 123. Why weren't they in school?

A. Beg your pardon; what would be the school for that boy would be recess for somebody else.

Q. 124. You mean that the periods, the school session were at different periods in Garfield?

A. Exactly. Now his sister goes at school when he is at recess, he has two hours off and his sister is at school.

Q. 125. Now, how many times, Mr. Hilt, did you see any of the train crews around while your children were in the vicinity of the switch, that is during a month or during a year?

A. Quite often, I wouldn't undertake to give any distinct figure on that, but quite often; almost every time that the train crew would be there I would see one or two children, more or less.

Q. 126. Yes, but more or less, what do you mean, one?

A. Maybe two, maybe half a dozen, maybe none at all.

Q. 127. So that many times when the train crews were there, there were no children around?

A. Well, that may be at that.

Q. 128. Now, how many times during the month, or during the year, did you see train crews and at the same time see children around the switch?

A. I wouldn't give no figures on that, because I know it to be a positive fact when I unload coal there, there was an average of fifteen kids at them cars, and they were switching in and out right along.

Q. 129. How along ago was that?

A. I would say only this summer, one year ago, just about this time one year ago.

Q. 130. About a year ago? A. Yes.

Q. 131. And that was eight or ten months before the accident to your boy?

A. No, the boy had already been hurt then.

Q. 132. Oh, that was after the accident? A. Yes.

Q. 133. Now, before the accident to the boy, how many times did you see train crews around at the same time the children were near the switch?

A. As I told you it was almost a daily occurrence.

Q. 134. Well, but did you actually see it every day?

A. I didn't say every day, I said almost a daily occurrence.

Q. 135. What do you mean by almost a daily occurrence?

A. Almost every time I would pass there and see the car there I would see kids there.

Q. 136. How many times did you pass there and see the car and the kids there during a month or year?

A. I wouldn't say that because a man is accustomed to pass one certain way, he don't take notice of it as long as he would when someone is hurt; then he would start to keep track.

Q. 137. So that you didn't pay particular attention to the children near the switch before your boy was hurt?

A. Yes, I did, too, but I never took a pencil and paper out and started to figure out how many I did see.

Q. 138. What attention did you pay, you just walked by, didn't you?

A. Walked by, and if I seen a child between the cars why I got hold of him and told him to go home.

Q. 139. How many times would that happen?

A. I wouldn't say that either.

Q. 140. Were the train crews around then?

A. Not all the time.

Q. 141. How many times would you say that you saw the train crews? A. I guess a dozen times a year.

Q. 142. About a dozen times a year? A. Yes.

Q. 143. How many times did you see the section foreman in the vicinity of the switch at the same time there were children there?

A. Well, I don't like to answer that question, because I am afraid of getting the section foreman in trouble.

Q. 144. I want you to answer it.

A. Well, I guess I seen the section foreman there seven or eight times within a period of two years when children were playing there on the switch.

Q. 145. Seven or eight times during a period of two years? A. Yes, within the last two years.

Q. 146. Where was the section foreman when you saw him?

A. On a trestle right alongside of the switch and also the main alongside of the switch.

Q. 147. How far is the trestle from the switch?

A. It is almost the wind up of the switch, the beginning of the wind up of the trestle; you strike the freight house, went up to the freight house, you strike the bumper.

Q. 148. What was the section foreman doing at the time? A. Repairing the track.

Q. 149. Repairing the track? A. The right of way.

Q. 150. That is the main track?

A. The main line right of way.

Q. 151. That's all.

ROBERT KISSLER, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Mr. Kissler, where do you live? A. Newark.

Q. 2. What is your business? A. Huckster.

Q. 3. Are you ever in Garfield on your business?

A. Three and four days a week.

Q. 4. On April 5th, last year, were you in Garfield?

A. Yes, sir.

Q. 5. What do you know, if anything about the injury to this little boy?

A. I picked him up with his leg hanging off.

Q. 6. Just explain to the Court and Jury what occurred as to how you were attracted to the scene of the accident.

A. By the cars backing in.

The Court—No, what you saw and what you heard?

By the COURT.

A. Well, I heard him holler.

Q. 7. Where were you?

A. In the house right in front of him.

Q. 8. On Hobart Place? A. Yes, sir.

Q. 9. You were—

A. I was talking to a woman selling a basket of potatoes.

Q. 10. In the front or rear? A. Rear.

Q. 11. You heard what? A. Heard a boy holler.

Q. 12. What did you do?

A. Dropped the basket of potatoes, jumped over the fence, picked the boy up.

Q. 13. Jumped over the fence between the driveway and the switch track? A. Yes, sir.

Q. 14. What did you see when you got over the fence?

A. A little boy laying on the right side with his leg hanging off.

Q. 15. Where was he as respects the switch train?

A. Well, I will say about 20 feet away from the back of the car.

Q. 16. Well, was he on the track?

A. No, sir, he was off the track.

Q. 17. Which side of the track, south or north side?

A. South.

Q. 18. About how far?

A. Well, I judge about a foot.

Q. 19. About a foot off, and where was the train then?

A. The train was standing still.

Q. 20. How many cars were in it?

A. That I couldn't tell you. I didn't count them; I picked the boy up and went off.

Q. 21. About where was the boy to the end of that fence that runs along the driveway; how far from it?

A. About 20 feet.

Q. 22. East or west? A. West.

Q. 23. And where was the train as respects the boy?

A. That I couldn't tell you; I got too nervous.

Q. 24. Well, I know, was the train entirely clear of the boy or was it right alongside of him?

A. Alongside of him.

Q. 25. And how far was the boy from either end of one of the cars? A. That I couldn't tell you.

Q. 26. Now, just go over there on that map and mark with a K about the place where you think that boy was lying when you saw him.

A. I jumped this fence, went up about to here, picked the boy up, held him in my arms about four minutes.

Q. 27. The boy was about a foot from the rail?

A. About a foot from the rail.

Q. 28. Then he was beyond the easterly end of the fence, was he? A. Yes.

Q. 29. You jumped the side fence, not the back fence?

A. I jumped the back fence.

Q. 30. Was the boy at the westerly end of the back fence? A. Yes, this side.

Q. 31. Well, east of the end of the back fence?

A. Yes, east of the back fence.

Q. 32. You mean the west?

A. West end; then I handed him to him and walked away.

Q. 33. What do you mean by him? A. That man there.

(Jacob Devoe stands up in court room.)

A. I handed him to him, and he took him up to the depot on Passaic Street.

By Mr. GREENSTONE.

Q. 34. Now, how long did you hold this boy in your arms? A. From 3 to 4 minutes, easily 4 minutes.

Q. 35. Did you see any railroad men around at that time, while you were holding the boy in your arms?

A. Not just at that time, no, sir.

Q. 36. What attracted your attention first?

A. Why, the hollering of the boy.

Q. 37. Well, was there a crash of cars? A. Yes, sir.

Q. 38. Did that occur before the hollering of the boy?

A. Yes, a little before the hollering of the boy.

Q. 39. Was that a very loud crash? A. Pretty loud.

By the COURT.

Q. 40. What was it, just the coupling together of cars?

A. Just coupling together.

Q. 41. The ordinary noise that coupling of a train means? A. Yes.

Q. 42. After you picked up the boy did you call for help?

A. I hollered for the young fellow was working with me, a fellow named Kime.

Q. 43. He was on Hobart Street?

A. He was on Hobart Street, and ran away. I seen this gentleman walking up.

Q. 44. Which way was he walking?

A. Up towards Passaic Street.

By Mr. GREENSTONE.

Q. 45. Now, Mr. Kissler, was there any other boy nearby? Yes, sir.

Q. 46. Was he older or younger?

A. He looked to be about a year older than this little fellow here.

Q. 47. Older or younger? A. Older, I should think.

Q. 48. You are not sure of that, are you?

A. No, sir; I am not; I ain't seen him since.

Q. 49. Do you know who the boy was? A. No, sir.

By the COURT.

Q. 50. You said that this man that you handed him to came walking along; what direction was he walking from?

A. He was walking from an engine back towards Passaic Street.

Q. 51. He was on the south side of the track, was he?

A. On the south side of the track.

Q. 52. The side where the boy was lying? A. Yes, sir.

By Mr. GREENSTONE.

Q. 53. Now, just before that time, had you seen the little Hilt boy in the neighborhood? A. Yes, sir.

Q. 54. About how long before he was hurt?

A. About 5 minutes before he was hurt.

Q. 55. And how close to the cars was he then?

A. Well, he was alongside the track then, him and this other little boy. I told them to get away from there.

Q. 56. You mean outside, towards the street?

A. Outside towards the street.

Q. 57. That's all.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 58. How long before the accident to the little Hilt boy was it that you saw him? A. About 5 minutes.

Q. 59. Where was he then? A. Alongside the track.

Q. 60. Alongside the switch?

A. No, he was way up the side.

Q. 61. Up by the freight house? A. Yes.

Q. 62. How close was he to the freight house?

A. About 25 or 30 feet.

Q. 63. East of the freight house or west of the freight house? A. Yes, sir; east of the freight house.

Q. 64. East of the freight house 25 or 30 feet, so that he was between the freight house and the end of the switch?

A. Yes, sir.

Q. 65. Was there any boy with him at that time?

A. Yes, sir.

Q. 66. What did you say to him then?

A. Told him to get away from there, he would get hurted.

Q. 67. Did you watch to see what he did?

A. No, sir; I did not.

Q. 68. Went right on?

A. Went on with the potatoes, yes.

Q. 69. How long after you told the boy to get away was it that you heard him holler?

A. Well, about between 5 and 10 minutes; it wasn't 10 minutes, for I went in the first house, and from there to the second house.

Q. 70. You say about 5 minutes? A. About 5 minutes.

Q. 71. You just had time after you told the boy to get away to get down Bogart Avenue to the house?

A. Yes, sir.

Q. 72. Shown on the map here?

A. Yes, just about time; I only had two houses, the second house.

Q. 73. Did you say that the boy was about a foot from the track when you picked him up?

A. Right alongside the track.

Q. 74. On the south side of the switch? A. South side.

Q. 75. And how far from the Passaic Street crossing?

A. From Passaic Street crossing two or three hundred feet.

Q. 76. About how far from the Hobart Place crossing?

A. Which one is Hobart Place?

Q. 77. The one at the extreme right of the map.

A. I couldn't tell; about 100 feet, something like that.

Q. 78. At any rate, you say the boy, when you picked him up, was about where you put the yellow cross on the map? A. Yes.

Q. 79. After you told the boy to get away, you came directly down Bogart Avenue, didn't you? A. Yes, sir.

Q. 80. Didn't do anything, you were trying to get in the house to sell your goods? A. Yes.

Q. 81. Were there any other boys aside from the little Hilt boy and the one other boy you saw in the vicinity at the time? A. No, sir.

Q. 82. They were the only two, were they?

A. The only two.

Q. 83. You don't know who the other boy is?

A. No, sir.

Q. 84. He isn't in the court room?

A. No, I don't think so; if he was here I wouldn't know him if he was in front of me.

Q. 85. You wouldn't know him? A. No.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 86. Mr. Kissler, what sort of game was he playing when you saw him first?

A. I couldn't tell what he was playing; he was on his knees.

Q. 87. Did you see him do anything while on his knees?

A. No, sir; I did not.

Q. 88. You say a foot from the track, you found his body a foot from the track? A. Yes, sir.

Q. 89. Do you mean his body projected outside of the track? A. Outside of the track.

Q. 90. Towards the street?

A. Towards the street; yes, sir.

Q. 91. And was he beyond the car; was his body beyond the car or underneath the car?

A. Beyond the car; it wasn't underneath the car at all.

Q. 92. That's all.

JOHN MAITLAND, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Mr. Maitland, what is your occupation?

A. Patrolman.

Q. 2. For what municipality? A. The City of Garfield.

Q. 3. How long have you been patrolman for the City of Garfield? A. About nine years.

Q. 4. Are you acquainted with this section where this switch on the map appears? A. I am.

Q. 5. Are you in frequent contact with the neighborhood there? A. Yes, sir.

Q. 6. About how often a day do you pass by in the neighborhood?

A. Well, this last eight months I live within half a block of that.

The Court—No, we are concerned with before April 5, 1916.

The Witness—Well, on an average of once a day I might pass there.

The Court—What time of day?

The Witness—In the afternoon.

The Court—The afternoon is a long while, what do you mean by that?

The Witness—About two o'clock.

Q. 7. Now, did you at any time see children playing around this place?

Q. 8. Well, was it a frequent occurrence or very seldom?

Mr. Bain—I object, if your Honor please, unless a time is specified.

The Court—Well, how long a period have you seen children around there before the 5th of April, 1916?

The Witness—A good many years.

The Court—What do you mean by a good many years, one or two years?

The Witness—Ten years.

The Court—What time of day have you seen them?

The Witness—Mostly in the afternoon.

The Court—And how frequently as respects the days of the week?

The Witness—What's that?

The Court—How frequently?

The Witness—Well, almost every day in the week on the average.

The Court—About two o'clock in the afternoon.

The Witness—Well, if I be working days and I be down there, you know around that neighborhood, I see them pretty nearly always in the day time.

Q. 9. Is your post often in that neighborhood?

A. Well, two weeks out of every eight.

Q. 10. Have you seen railroad employees working while the children were playing in the neighborhood?

Mr. Hobart—Objected to as incompetent, irrelevant and immaterial.

The Court—Why is it incompetent and immaterial and why irrelevant?

Mr. Hobart—The mere fact that railroad employees were around—

The Court—Show us they were, they would be charged with knowledge of children there.

Mr. Hobart—No evidence that they knew or were in a position to know there were children around.

The Court—The jury will determine that if they find out that they were in a position where they could have known.

(Question repeated.)

The Court—That is, working around there.

A. Now, do you mean the brakemen, the trainmen?

The Court—What he means is this, the question is very inartistically put. What he means is this: Why, you have seen children playing in and around that freight station, as you testified, have you seen railroad employees in and around the same place doing their work?

The Witness—Yes, I have.

The Court—And where have you seen employees on such occasions?

The Witness—Well, I have seen them when they have been backing in the freight and pulling out.

The Court—They would be trained men, would they?

The Witness—Yes.

The Court—Have you seen other railroad men around there?

The Witness—I have seen a railroad gang working around the tracks.

The Court—This would be a track gang?

The Witness—Yes.

The Court—Have you seen the flagmen or station agents, or anything of that kind there under those circumstances?

The Witness—At different times I have seen them come down to the freight depot.

The Court—When the boys were there, when the children have been there playing?

The Witness—Yes.

The Court—How near would they be to the children?

The Witness—Well, they would always have to pass the children.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 11. Where were the children when you saw railroad employees in the vicinity?

The Court—Had you finished?

Mr. Greenstone—There is one other question I wanted to ask.

By Mr. GREENSTONE.

Q. 12. Did you see the railroad employees chase these children? A. Well, yes, I have seen them do that.

Q. 13. And was that frequently or infrequently?

A. Well, I don't know just what he did to them of course, we passed there lots of times, you wouldn't pay much attention to it you know, whether they chased them or not.

Q. 14. Have you ever chased the children yourself?

A. Oh, yes.

Q. 15. And was that while railroad employees were there working around?

A. Well, they might not be in that particular vicinity at that particular moment.

Q. 16. What I mean is in the neighborhood?

A. They might be in the neighborhood, somewhere around there.

Q. 17. And have you seen the children playing around and not being chased very often? A. Yes, sir; I have.

Q. 18. That's all.

By the COURT.

Q. 19. What did the children do there in the way of play?

A. Oh, just hop up on top of the cars and play around there, different games.

Q. 20. I know, but there are many games.

A. Whenever in winter time they had a habit of going up there with sleighs, sledding down the hills.

Q. 21. Where is the hill?

A. From Bogart Avenue up to the freight station, there is a little bit of a hill there.

Q. 22. Down that driveway? A. Yes.

Q. 23. Between the fence and the track?

A. From Passaic Street half way down the block, there is an incline there.

By Mr. BAIN (Continued).

Q. 24. Where was the hill down which the children sledded in the winter?

A. From Bogart Avenue up to the freight station.

Q. 25. Along the driveway or over the open space?

A. Along the driveway, along Bogart Avenue, from the driveway down to Bogart Avenue.

Q. 26. From the driveway down to Bogart Avenue, you mean the driveway along the fence just west of the buildings?

A. No, it is further up this way, right near Passaic Street, there near the trestle.

Q. 27. Well, was the hill where the children sledded west of the freight house?

A. It runs from Passaic Street.

The Court—Just go over there and point it out.

The Witness—It faces the freight house. Here is Passaic Street—the hill runs from here, it ends right here by the freight house and about fifteen feet—

Mr. Bain—The witness pointing out the hill from Passaic Street to the easterly end of the freight house.

Q. 28. And the children did not sled down to the switch or siding?

A. Well, they were coming from the switch; the switch runs all the way up there.

Q. 29. The children sledded from Passaic Street, did they not?

A. No, not from Passaic Street; from the top of the switch here down to Bogart Avenue.

Q. 30. But they sledded from about the freight house down to Bogart Avenue? A. Yes.

Q. 31. And they didn't sled along the driveway which runs parallel with the switch?

A. No, they couldn't, because the hill stops about here, then it is very near level ground from here down to the fence.

Q. 32. Just point out again, will you, where the hill stops?

A. Stops right at the trestle here on Passaic Avenue.

Q. 33. So that the children sledded from—

A. Well, from this neighborhood here, from Passaic Avenue to almost the end of the freight house.

Q. 34. Well, it was in front of the freight house and not in front of the switch. A. Well, this is the switch.

Q. 35. No, the switch does not run into the freight house? A. Well, no.

Q. 36. So that the children sledded in front of the freight house and not in front of the switch?

A. Well, from here down.

Mr. Bain—Pointing to the end of the switch, the westerly end of the switch.

The Court—And they sledded from that direction towards Bogart Avenue?

The Witness—Yes, sir.

Q. 37. You said that you saw the railroad employees chasing the children away from the vicinity?

A. Several times I seen them, yes.

Q. 38. And you chased them away yourself?

A. I have.

Q. 39. Why did you chase them away?

A. It is my duty.

Q. 40. Do you remember ever chasing the little Hilt boy away?

A. There was always so many there I couldn't pick them out, you know; I just hollered at them and told them to get away.

Q. 41. How often did you chase them away?

A. I couldn't just tell you the amount of times, but a good many times I have chased them.

Q. 42. Did you chase them every day while you were there?

A. Well, not exactly every day; every day if I happened to pass there and happened to see them I would chase them.

Q. 43. Every day you were on post that you passed this place and saw them you would chase them away?

A. Yes, sir.

Q. 44. What railroad employees did you see chasing the children away?

A. I seen the freight gang, and then you know the fellows that work on the freight there, different ones.

Q. 45. The crew of the train? A. Yes, sir.

Q. 46. You have seen them chase the children away?

A. I have seen them also do that, chase them away.

Q. 47. Ever see any of the other railroad employees chase the children away? A. I couldn't say they did.

Q. 48. You wouldn't say they didn't?

A. I wouldn't say they didn't.

Q. 49. Where were the children when you saw them around the switch?

A. Oh, be all around there, you know, no particular spot.

Q. 50. I think you stated that you were on post in the neighborhood of the freight house in Garfield two weeks out of every eight. A. Well, around that average, yes.

Q. 51. Would you say that every day of the two weeks that you were on post there you chased the children away?

A. No, I wouldn't say that.

Q. 52. You chased them away every time you saw them?

A. Every time I passed there and happened to see them I would chase them; that was our instructions.

Q. 53. From whom? A. The chief.

Q. 54. Of police at Garfield? A. Yes.

Q. 55. You said that you saw some of the train crews backing in freight cars on the siding while the children were around; where were the cars when you saw them?

A. Well, I wouldn't want to say that, I might be walking through there and not pay very much attention to it, just see the train come and see the children run, that is all.

Q. 56. So that you don't remember anything distinctly about the cars? A. No.

Q. 57. You wouldn't say that you saw the cars around; all that you mean to say was that you saw the train backing in?

A. I seen the train coming in and I seen the children run there.

Q. 58. That's all.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 59. Have you seen frequently railroad employees standing right near the children while they were playing about the switch? A. No.

Q. 60. And permitting them to play?

Mr. Bain—I object to the characterization "permitting them to play."

The Court—I will sustain that.

Mr. Greenstone—I withdraw that question.

Q. 61. Have you often seen children playing around there, this particular switch, and railroad employees in the neighborhood?

Mr. Bain—Objected to unless the time is specified.

Q. 62. Before April 5, 1916, for a period of years before then, say for five years before then.

Mr. Bain—I object to five years before the accident as too remote.

Q. 63. Up to and continuing to April 5, 1916?

A. Well, I don't know as the train crew would just be exactly—

Q. 64. I don't mean the particular train crew, but other employees?

A. Well, they might not be exactly where the children was playing; I have seen them in the neighborhood.

Q. 65. Within calling distance of the children?

A. Yes.

Q. 66. Within say fifty feet?

A. Oh, sometimes further way than that.

Q. 67. And sometimes nearer? A. Well, yes, perhaps.

RE-CROSS EXAMINATION, by Mr. BAIN.

Q. 68. You say that you saw some railroad employees in the vicinity of the switch while children were there; what were the employees—that is, what were they doing?

A. Well, they would be backing in or pulling out, they would be down there, the children would be playing around.

Q. 69. Now, how far would the train which they were backing be from the switch?

A. Oh, they might be down at the end of that fence there behind the house.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 70. Have you seen them at times in that open space where this particular freight house is, up to this fence?

A. I have seen them there, too.

JOSEPH SIMOLDONI, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Where do you live?

A. 68 Palisade Avenue, Garfield.

Q. 2. How long have you lived in Garfield?

A. About seventeen or eighteen years.

Q. 3. Do you know this particular section on the map where this freight house switch is? A. Yes, sir.

Q. 4. For how long a period of time have you known this section? A. About seven or eight years.

Q. 5. Did you see any children playing around during that time? A. Yes, sir.

Q. 6. Did you see children of all ages? A. Yes, sir.

Q. 7. By that I mean to say from five years and up.

A. From five to twelve and thirteen, or fourteen, or fifteen.

Q. 8. Now, about how many times a week would you see children there? A. Pretty near every day in the week.

Q. 9. Would you see many children playing around there?

A. Well, some days I would see three or four, five or ten, or twelve, and some days I would see two or three.

Q. 10. Have you seen the children playing there while

employees of the railroad were working in the neighborhood? A. Yes, sir.

Q. 11. On this switch? A. On the switch; yes, sir.

Q. 12. Did you see the children playing around there while the railroad employees were working there on the switch, and not being chased by the employees of the railroad?

Mr. Bain—Objected to unless time is specified.

Q. 13. Well, during that period of time you gave seven or eight years? A. Yes.

Mr. Bain—Objected to if he goes back seven or eight years as too remote.

The Court—Well, he asked him during the period, we will fix it in just a moment. His answer is yes.

Q. 14. Now, how frequently during that period have you seen them?

The Witness—During the last seven or eight years?

The Court—Yes, during the last seven or eight years preceding April, 1906.

The Witness—In the last two or three years I have seen, well, they generally fix that plug, you know, they put the freight in the switch, they generally fix that plug every two or three months and there is always two or three men working on that, fixing that plug and two or three boys playing .

The Court—Well, how frequently would you say that was.

The Witness—Well, maybe some days I wouldn't see none, some days I would see ten or twelve.

The Court—Children or men?

The Witness—Children.

The Court—Now, we are talking about men, railroad employees.

The Witness—There was always two or three men

working there, every month or two, fixing up a rail or putting in a bolt or something.

Q. 15. Well, outside of the fixing of the tracks, are there railroad men switching in there every day on the swtch?

A. Every day, sometimes two times a day, I guess.

Q. 16. And while these men are switching in there, have you noticed the children playing there? A. Yes, sir.

Q. 17. Not being chased by these men? A. Yes, sir.

The Court—Well, have you seen the railroad men chase the boys away, too?

The Witness—Sometimes I did, sometimes I did not.

Q. 18. Well, would you say that they more often chased them than they did not, or the other way?

A. They did not chase them more than they did.

Q. 19. That is, more often they did not chase them?

A. Yes.

Q. 20. Have you ever chased children away from there?

A. Yes, sir.

By the COURT.

Q. 21. What is your business?

A. Why, I have been a teamster for the last eight or nine years and I am a constable.

Q. 22. During your duties as teamster, did you drive up to the freight house?

A. I would drive there maybe five times a day, maybe two times a day, maybe work there all day long.

Q. 23. And it was in those times that you saw the children there and saw the men there?

A. There was always children there.

Q. 24. I know, but the employees.

A. Every time I went for freight there was an employee there to give me the goods.

Q. 25. Did you see children there when you went there for freight? A. Yes, sir.

Q. 26. You aer a constable out there also? A. Yes, sir.

By Mr. GREENSTONE.

Q. 27. How long have you driven there?

A. About seven or eight years.

Q. 28. Well, about how often a day have you driven up there?

A. What do you mean, past the freight station?

Q. 29. Yes.

A. I drove, maybe, six or seven times a day past the freight, through Passaic Avenue, or Summit, or through Hobart Place crossing.

Q. 30. And have you seen children often during those times you have driven up there?

Mr. Bain—Objected to.

The Court—Sustained. He has given you specifically, and often is a very relative term. He said he has seen them every day.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 31. You say that you saw children around the switch, and at the same time saw railroad employees in the vicinity?

A. I did.

Q. 32. What were the railroad employees doing?

A. Why, sometimes they would fix up the rail or put in a plug.

Q. 33. They were trackmen, weren't they?

A. Yes, trackmen.

Q. 34. Not freight handlers?

A. Yes, they are freight handlers, the checker, he is supposed to be a checker.

Q. 35. The checker was supposed to be in the freight house? A. Yes, sir.

Q. 36. But these men that you mention specifically were trackmen who were repairing the tracks? A. Yes, sir.

Q. 37. How far would they be from where the children were? A. Why, twenty-five or fifty feet.

Q. 38. And those men would be working on the tracks?

A. Yes, sir.

Q. 39. You say that you have seen members of the freight crew chase the children away from the switch?

A. I never seen the members of the freight crew, I have seen the agent come out and chase them.

Q. 40. Is that the man you refer to as the checker?

A. No, he is the agent.

Q. 41. The agent in the freight house? A. Yes, sir.

Q. 42. You have seen him come out and chase the children? A. Yes, sir.

Q. 43. What other employees of the railroad have you seen come out and chase the children?

A. That's the only one I ever seen chase them.

Q. 44. How many times is switching done over that switch in the day? A. Sometimes once, sometimes two.

Q. 45. Never more than twice?

A. To my knowledge, yes.

Q. 46. How many times were you in the vicinity of the switch at the time switching was done, that is during a month or during a year?

A. Well, pretty near every morning I used to wait and see when they switched in cars, take some stuff off the cars.

Q. 47. What time was switching done in the morning?

A. Sometime half-past ten, and sometimes in the afternoon.

Q. 48. What time in the afternoon was switching done?

A. Right after two, half-past one; it is according to what time they got ready.

Q. 49. You don't mean to say you saw switching being done every day?

A. Sometimes—every day, yes, sir, every day.

Q. 50. You went down there every day?

A. Every day, I was down there every day, seven or eight years.

Q. 51. And you saw switching done every day?

A. Yes, sir.

Q. 52. You saw children how many times around there?

A. Pretty near every day during the week.

Q. 53. How many times did you see children chased away during the week or month? A. In a year?

Q. 54. No, a week?

A. Some weeks nobody chased them.

Q. 55. No, but how many times did you see children actually chased away during the week?

A. Whenever the agent used to come home from dinner; he used to live right across from the railroad track; he would come across, and he would see the kids playing there and holler at them.

Q. 56. Did you chase them away?

A. I have chased them lots of times, yes, sir.

Q. 57. You saw other men, aside from the railroad employees, chase them away? A. Officer Maitland did, yes.

Q. 58. You saw him chase them away? A. Yes, sir.

Q. 59. How many times did you see children actually chased away while the switching was being done during the week?

A. I never seen any children being chased while switching was being done at all.

Q. 60. Did you chase them away while switching was being done?

A. No, not while the switching was being done; when I was in a car alone I used to chase them away.

Q. 61. When did you chase them away?

A. When I had a car to unload by myself I used to chase the kids away.

Q. 62. Well, cars were not being moved then?

A. No, sir.

Q. 63. The place was more dangerous when cars were being moved than when they weren't? A. What's that?

Q. 64. The place was more dangerous when cars were being moved than when they weren't? A. Yes, sir.

Q. 65. And you chased the children away when the cars were not being moved?

A. Sometimes one of the brakemen would come down and say, "Here, I am going to put a car in there, watch out for yourself." He would give me a tip that a car was coming in, to get out of the way; I would see a couple of boys around; I would chase them.

Q. 66. So that you did chase them away when switching was done?

A. Sometimes I would, sometimes I would not.

Q. 67. And you saw Officer Maitland chase them away when switching was done?

A. No, I never seen him when switching was done.

Q. 68. That is, you never saw him in the vicinity when switching was done? A. No.

Q. 69. What were the children doing when you saw them?

A. Playing ball, jumping on the cars, making out they were brakemen; one fellow was a conductor, the other fellow was a flagman; playing marbles, football, kicking the football all around.

Q. 70. At that time the cars weren't being moved?

A. No.

Q. 71. No switching being done then? A. No.

Q. 72. And whenever the switching was being done the children were chased away? A. Not as I know of.

Q. 73. You chased them when switching was being done?

A. Sometimes.

Q. 74. Officer Maitland chased them when switching was being done? A. Not as I know of.

Q. 75. Did you ever see switching being done when the children were not chased away? A. Yes, sir.

Q. 76. Why didn't you chase them away then?

A. It wasn't my duty.

Q. 77. You chased them away when switching was not being done?

A. When I had a car by myself I always did chase them.

Q. 78. Why did you chase them when switching was not being done, when you say that you did chase them away when switching was being done?

A. Because I had a carload of stuff by myself to empty, it was in my hands to take care of that car, that's the reason I chased the boys and girls away.

Q. 79. Well, you thought the children were in danger when there was no switching going on? A. No.

Q. 80. Then why did you chase them away then?

A. Because they would be in my way, jumping on the wagon, want to come in and give me a hand, sometimes three or four kids would come in and try to give me a hand.

Q. 81. You knew the children might be hurt?

A. That's the reason I chased them.

Q. 82. When switching was being done? A. Yes.

Q. 83. And you didn't stand around there when switching was being done and not chase them away?

A. When switching was being done I always got away from the railroad property.

Q. 84. Oh, when switching was being done the children got away from the railroad property?

A. I kept away, I never went near the cars when switching was being done, after the engine went away then I used to jump into my car.

Q. 85. Didn't the children keep away when the switching was being done? A. Not that I know of.

Q. 86. Did you ever see them?

A. I always seen the children around there when switching was being done.

Q. 87. Well, but didn't you chase them away at that time?

A. I have chased them away when the car went away altogether, when I had the car by myself then I chased them away.

Q. 88. Were you close to the children while the switching was being done? A. No, sir.

Q. 89. How far were you from them?

A. Maybe fifty feet, maybe twenty-five, maybe one hundred, I don't know.

Q. 90. Did you yell at them to get out of the way? 10

A. No, sir.

Q. 91. You saw switching being done there, the cars moving and children playing around the cars, you never shouted to them to get out of the way?

A. I didn't have the car there for—

Q. 92. No, I am asking that question. A. No.

Q. 93. Well, you did chase them away when there was no switching done? A. I did; yes, sir.

Q. 94. You are a police officer? A. I am a constable.

Q. 95. Of— A. Garfield. 20

Q. 96. Didn't you know that there were orders of the police force of Garfield— A. I wasn't a constable at that time.

Q. 97. You weren't? A. I was only a citizen.

Q. 98. How long have you been a constable?

A. Two years.

Q. 99. That is for two years past? A. Yes.

Q. 100. Now, when did you become a constable?

A. 1915.

Q. 101. What month? A. In the November election. 30

Q. 102. You were elected a constable in November?

A. Yes, sir.

Q. 103. When were you sworn in? A. First of May.

Q. 104. First of May, 1916? A. Yes, sir.

Q. 105. You didn't actually do any service until you were sworn in? A. No, sir.

Q. 106. Were you ever a constable before that?

A. No, sir.

Q. 107. How many times in the week or in the month or in the year did you see children play around while switching was being done?

A. Well, I wasn't around every day when switching was coming in, understand; in the morning like, in the morning we would go to the cars to get some freight, maybe ten or eleven o'clock, the boss would say, "You have to go—" maybe one o'clock he would say, "Come back to the car again."

Q. 108. Now, just listen to the question, and answer: How many times in a week or month or in a year did you see children playing around the switch while switching was being done?

A. Every time I was there there were always children around there.

Q. 109. How many times in a week or month or year were you there while switching was being done?

A. How many times was I there in a week?

The Court—While switching was being done.

A. Oh, in a week; I will say about four times a week.

Q. 110. And how many of those four times while switching was being done did you see the children chased away?

A. I have never seen children chased away at all while the switching is going on, while the engine is coming in.

Q. 111. You never tried to chase the children away, then?

A. No, sir. Afraid some of the kids would throw a stone at me or something.

Q. 112. Afraid those little fellows, four or five years old, would throw a stone at you? A. Yes.

Q. 113. That's all.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 114. Well, now, you weren't afraid of the four or five-year-old boys?

A. No, but when I used to chase them I used to chase them maybe six or seven years ago, I used to chase them away—

Q. 115. No, just answer this question, you weren't afraid of the little boys, were you? A. No.

Q. 116. Were there boys of older years playing around there? A. Yes, sir.

Q. 117. And it was of the older boys that you were afraid?

The Court—Oh, stop leading him.

A. No, I ain't afraid—

Mr. Greenstone—I withdraw that question.

Q. 118. Did you ever play on this place yourself?

A. Yes, sir.

Q. 119. How long ago?

A. Oh, I played there fifteen years ago.

Mr. Bain—I object to that and ask that it be stricken out.

The Court—I will strike that out.

Q. 120. And you are quite sure that for a period of seven or eight years, up to April 5, 1916— A. 1915.

Q. 121. 1916, you have seen children playing during that time very often? A. Yes, sir.

Q. 122. That's all.

RE-CROSS EXAMINATION, by Mr. BAIN.

Q. 123. You are equally certain that equally often you have seen children chased away from the switch?

A. I never seen nobody chase anybody away from there.

Q. 124. But you are equally certain that an equal number of times you saw children chased away from the switch?

A. No, seven or eight times I only seen, maybe two or three times anybody being chased off the railroad.

Q. 125. And you only chased them off this particular switch yourself two or three times?

A. No, I am telling you what the railroad people done.

Q. 126. But I am asking you how many times you saw children chased away?

A. Every time I got a car by myself I always chased the boys away.

Q. 127. And you frequently chased the boys away?

A. Yes, I always chased the boys away, every time I got a car by myself.

Q. 128. And you frequently saw others chase them away? A. No, only the agent.

Q. 129. What about Officer Maitland?

A. When he was on duty.

Q. 130. You have frequently seen him chase them away? A. Yes, I have seen him.

Q. 131. So that you frequently chased children away and frequently saw others chase them away?

A. Yes, I chased them myself when I had a car by myself. I have a car loaded, it is my car.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 132. How about this bumper that you mentioned, have you seen the switching of such force as to shatter this bumper?

Mr. Bain—Objected to.

A. Yes, sir.

Mr. Bain—Entirely immaterial.

The Court—Well, it is very leading, and I will overrule it for that reason.

Q. 133. I will ask you this question, have you ever seen this switching carried on recklessly?

Mr. Bain—Objected to.

Mr. Greenstone—Question withdrawn.

Q. 134. Have you seen the switching there to such an extent—

The Court—State how you have seen the switching.

A. I tell you, sometimes they would switch in O. K., sometimes they would switch in making the car go up against the bumper and loosen up the bumper or ties, whatever you call it.

Mr. Bain—I ask that that be stricken out.

The Court—I will allow that.

Defendant's counsel asks an exception, which is hereby allowed and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

FRANK VITALE, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Mr. Vitale, how long have you lived in Garfield?

A. Around twenty years.

Q. 2. Are you familiar with this section where this switch is located on this map? A. Yes, sir.

Q. 3. For how long a period of time have you known this section? A. The last twenty years.

Q. 4. During that period of time have you seen children playing there?

Mr. Bain—Question objected to unless a specific time is stated.

The Court—I think he may answer that.

Defendant counsel asks an exception, which is hereby allowed and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

A. Yes, sir.

The Court—Now then, when did you begin to notice children playing there in that period of twenty years?

The Witness—Judge, I didn't pay close attention

to them until the last six or seven years, for the reason that I live in the third house.

The Court—You live the third house from where?

The Witness—Right the third house from—

The Court—All right, go show where you lived.

The Witness—I lived right in this house (indicating).

The Court—He lives (indicating the third house easterly on the map).

By the COURT.

Q. 5. Now, you say that you have lived there for seven years? A. Not quite seven years.

Q. 6. Now then, prior to April 5, 1916, how often had you seen children playing in and about that switch yard?

A. Daily.

Q. 7. That's for a period of? A. Five years.

Q. 8. Five years before April 5, 1916?

A. Yes. I have office right along the track, the other side of the track, the corner of Somerset Street, opposite the police station, and daily I used to go forward and back along the track three or four times a day.

By Mr. GREENSTONE.

Q. 9. What sort of an office did you have?

A. Real estate office.

Q. 10. Have you seen the children playing there during that time you have mentioned, while railroad employees were working in the neighborhood? A. Yes, sir.

Q. 11. And have you seen that occur without the children being chased by the railroad employees? A. Yes, sir.

Q. 12. Have you seen that done frequently during the five years? A. Almost daily.

The Court—Well, you have seen the children

playing there; what were they doing and where were they playing?

The Witness—Your Honor, up and down the car, between the car, jumping up on the car, playing freight man, soldiers, and the reason I pay attention I have eight children my own; the oldest one is fourteen, and every day I had to go chasing around, looking around inside the car and out.

Q. 13. And have you seen many children besides your own playing there? A. Yes, sir.

Q. 14. Have you warned your children away from there?

A. Daily. Their mother warns them also daily.

Q. 15. Have you seen the section foreman in the neighborhood while the children were playing there?

A. I have seen the section foreman many times around the neighborhood.

Q. 16. Speak up loud.

A. I did see the section foreman around the neighborhood many times.

Q. 17. And would he or would he not chase the children?

A. Sometime I hear him holler to the children from far away, "Get out," and hollers to the children and stay by his work.

Q. 18. Was it more often that he would chase, or more often that he would not chase them, you have seen?

A. Yes.

Q. 19. Well, which is it?

A. Well, don't chase them because I suppose he take care of his work; I don't know the reason, I did not look.

Q. 20. Well, did he not chase them—

The Court—More often he chased them than he didn't, which is it?

The Witness—He did not chase them.

Q. 21. Have you chased children away from there yourself?

A. Daily I ran up from the office. In the office I had a window there, almost you could look across, there is nothing in the way there to prevent, to see the freight house, and all the time I used to go across to where there is the Somerset Hotel, and I telephoned from the hotel sometime, and I crossed the place and I happened to look there, many times they used to tell me, "Frank, there is children hopping up right over on the crossing." I used to go over there and chase them out.

Q. 22. Have you seen any of the employees asleep while children were playing there?

Mr. Bain—Objected to.

The Court—Objection sustained.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 23. How far is your office from the switch shown on the map? A. It would be about five hundred feet.

Q. 24. You were in your office every day?

A. Daily; yes, sir.

Q. 25. How long between, what hours?

A. Any time I would get up, eight o'clock, nine o'clock, seven, depends.

Q. 26. That is, you were there from in the morning until the afternoon?

A. Until ten or eleven o'clock at night sometimes.

Q. 27. From along about seven, eight or nine o'clock in the morning until eight, nine or ten o'clock at night?

A. Yes, sir.

Q. 28. How many times a day was switching done over the siding shown on the map? A. That I cannot tell you.

Q. 29. You could see, couldn't you?

A. I could see a car once in a while move up and down, I could hear the bump sometimes, two or three times I could notice that.

Mr. Greenstone—Speak louder.

A. I could hear the bump going off of the track, they used to fix that generally every three or four months.

Q. 30. Don't you know that switching was done on that switch only once a day? A. I cannot tell how many times.

Q. 31. Did you ever see switching done on that switch more than twice a day? A. Yes.

Q. 32. How many times?

A. I cannot keep track of it, I know more than once, otherwise more than three times.

Q. 33. Very, very seldom was it more than once or twice?

A. I cannot tell you.

Q. 34. You were in a position to see?

A. Yes, but not in a position to keep track how many times they switched.

Q. 35. You did hear them nearly every time switching was done? A. Pretty near, yes.

Q. 36. Don't you know the switching was done at a regular time each day?

A. That I couldn't tell you, I couldn't keep track.

Q. 37. Don't you know that was the fact?

A. No, I didn't know anything about it.

Q. 38. What time did you usually see switching done in the morning?

A. That I cannot tell you, because generally in the morning I be in police station.

Q. 39. What time did you usually see switching done in the afternoon?

A. Sometimes three, half past three, two o'clock sometimes.

Q. 40. Between two and half past three?

A. Sometimes before four.

Q. 41. You never saw switching done more than once in the afternoon? A. That I couldn't tell you.

Q. 42. Never saw switching done more than once in the morning, did you? A. I can't tell you.

Q. 43. You cannot tell anything about the switching, can you?

A. Yes, I can tell that, but I didn't keep track of the time, how many times they switch.

Q. 44. Never mind the exact hour, but how many times did you see or hear switching done in the forenoon?

A. I cannot tell you, different times, I cannot keep track because I done my business.

Q. 45. Well, generally, one switching is only done once in the morning?

A. I cannot tell you whether once or twice.

Q. 46. You always chased children away when you saw them around the switch, didn't you? A. Yes.

Q. 47. And you say you chased them away every day?

A. Pretty near.

Q. 48. Did you see others chase the children away from the switch? A. Yes.

Q. 49. Who did you see?

A. I see many times Mr. Farrell, lived right across the way and Vreeland, the baker, neighbors, all keep their eye on that place because they go there to play.

Q. 50. You saw Officer Maitland chase children away?

A. That I don't remember.

Q. 51. Now, how many times did you see the man from the freight house chase them away?

A. Oh, I often seen Mr. Dougherty come out and he hollered from the depot to the freight house.

The Court—What is he, the agent there?

The Witness—Yes, sir; Mr. Dougherty.

Q. 52. You saw members of the train crew chase the children away, didn't you? A. Once in a while, yes.

Q. 53. How often? A. That I couldn't tell you.

Q. 54. Cannot tell? A. No.

Q. 55. Well, would you say it was many times?

A. I cannot tell how many times it is.

Q. 56. But you can tell how many times it was that they did not chase the children away, can't you? A. No, sir.

Q. 57. You cannot tell that either? A. No.

Q. 58. So that you don't know how many times the train crew did or did not chase children away?

A. I know they did.

Q. 59. Did what?

A. Chase them sometimes; most times they didn't. I seen them stay on the corner under the shade of a tree. You want me to explain that your Honor?

The Court—No.

Q. 60. You didn't remember how many times the train crew didn't chase them away?

A. Most times they didn't chase them away.

Q. 61. How many times was it the train crew did not chase the children away?

A. I cannot keep track of the time.

Q. 62. How can you say then it was more times that the train crew did not chase the children away than they did?

A. That's my judgment.

Q. 63. Oh, that's your judgment, you are just guessing?

A. No, not guessing, I saw it.

Q. 64. You never kept any account of it?

A. No, my estimation of seeing daily, three or four times daily crossing the place, I take it they been there more times without being bothered.

Q. 65. But you just think it was more times the children were not chased away than it was that they were chased away, is that right, that's just what you think?

A. I am not thinking at all, I know it.

Q. 66. How do you know it? A. I seen it.

Q. 67. Well, when the children were there and were not being chased away there were no cars being moved?

A. Sometimes there is cars moved, they clean out the yard, the freight house ain't big enough to carry all the freight that is coming in.

Q. 68. Never mind that; when the cars were not being moved there would be children around?

A. All the time, moving and not moving.

Q. 69. And sometimes when the cars were not being moved you saw the children being chased away?

A. Yes; moving, too, sometimes.

Q. 70. You saw children chased both times? A. Yes.

Q. 71. And when the cars were moved you saw the children chased away by the train crew? A. Not always.

Q. 72. Well, practically all the time you saw the children chased away by the train crew?

A. No, not always; I saw the car moving with children inside the car.

Q. 73. Did you see them go inside the car?

A. I seen one of my boys up in it.

Q. 74. You promptly hauled him out, didn't you?

A. I didn't know it until I got home that night.

Q. 75. Did you tell him when you got home that night?

A. I got told when I got home that night.

Q. 76. Oh, your son told you when you got home?

A. My wife told me, not my son.

Q. 77. Oh, your wife told you when you got home?

A. Yes.

Q. 78. He never went in the car again, did he?

A. No, not after that.

Q. 79. Freight cars are unloaded from this local siding shown on the map, aren't they?

A. Yes, all the way along to Hobart Place.

Q. 80. All the way along from Hobart Avenue down to the freight house? A. Yes.

Q. 81. And wagons would come in? A. All along.

Q. 82. And along between the end of the siding and Hobart Avenue? A. Yes, sir.

Q. 83. And take freight out of the freight cars and put freight into the freight cars? A. Yes, sir.

Q. 84. And that was what that driveway was for?

A. Yes, sir.

Q. 85. That's all.

Adjourned to Thursday, June 28, 1917.

THURSDAY, June 28th, 1917, 10 A. M.

Case continued.

Appearances—Same.

Mr. VITALE, resumed.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 86. Mr. Vitale, did you ever see the switching that went on there at that switch, the switching of cars?

A. Yes, sir; I did.

Q. 87. Well, would they sometimes have men on the rear of cars when the switching went on?

A. Sometimes they have a man on the rear.

Q. 88. And how would they switch at other times?

A. Sometimes this man stands on the bend; there is a curve over there, the man stands on. He cannot see the engineer because there is sort of a curve, the engine is here and the man on the end cannot see the engine, he has to be right there between the middle, so he can see the end and the other side. There is a cure that shape, so therefore they have got to be two men on the ground.

Q. 89. On account of this curve? A. Yes, sir.

Q. 90. Would they sometimes let a car slide into that switch? A. Yes, sir.

Mr. Bain—Objected to.

The Court—I don't think that makes any difference. I sustain the objection.

Q. 91. Would they sometimes let cars slide into that switch without any man in the rear watching? A. Yes, sir.

Mr. Bain—Objected to.

The Court—Objection sustained, the same question, don't repeat it.

Mr. Greenstone—No, I added that "without a man on the ground."

The Court—What difference does that make, we are not trying the question of negligence at some other time, we are trying to establish a series of dealings whereby the railroad company would be charged with knowledge that children were around there, and then they were required to exercise a certain degree of care. Now, whether they exercised that degree of care on the occasion in question is one thing, but you cannot prove that they did not exercise that degree of care by proving what they did at some other time.

Q. 92. You kept no books or any memorandum as to the number of children that played there every day?

A. No, sir.

Q. 93. Besides the crew working there, did they have any watchmen or detectives watching this section?

A. I didn't catch that right.

Q. 94. Besides the crew working there did they have any other employees, detectives, watchmen or any other employees in this section?

A. They had a day detective last year and they quit him.

Mr. Bain—I object to this, what they had long ago.

The Court—Last year he says; what do you mean by last year?

The Witness—Last year they had a day man watching along from the depot to the track.

The Court—What do you mean by last year?

The Witness—I think it is more than a year since they chase him away, discharge him.

The Court—All right, I sustain the objection.

Q. 95. How long ago was he discharged, or did he leave the employ, either one?

Mr. Bain—Objected to.

The Court—Sustained.

A. He was discharged.

Q. 96. Well, how many detectives did they have there?

Mr. Bain—Same objection.

Q. 97. Before April 5, 1916.

Mr. Bain—Same objection.

A. One.

The Court—Wait a minute, I think I will allow that just for the same reason that I permit the testimony that there were station agents and other people around there who did not chase the children away.

Defendant's counsel asks an exception, which is hereby allowed and and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

(Question and answer repeated.)

Q. 98. Did they ever have more than one? A. Yes, sir.

Q. 99. How long before that date did they have more than one?

Objected to.

A. About a year.

The Court—I will take it.

Defendant's counsel asks an exception, which is hereby allowed and and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

Q. 100. You say about a year before then? A. Yes.

Q. 101. How many did they have then?

Mr. Bain—Objected to as entirely too remote.

The Court—I understand your objection, you have got the benefit of it.

A. Two.

The Court—Did you ever see him chase children away?

The Witness—No, sir.

The Court—What did you think he was there for?

The Witness—I never saw him, because he always walked up and down the track daily.

The Court—Where did he go?

The Witness—Along the Erie property.

The Court—Well, he wasn't right in this vicinity, he went all over, did he?

The Witness—Yes.

The Court—Walked way up the track and down?

The Witness—Yes, sir.

The Court—He would only be in this vicinity, I presume, for a few moments as he was walking down the track, is that it?

The Witness—Yes, sir.

Q. 102. Were they stationed at this particular section in Garfield?

Objected to.

The Court—Sustained; that does not amount to anything, he has already said they kept walking up and down.

NORMAN FARRELL, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Mr. Farrell, where do you live? A. In Garfield.

Q. 2. How long have you lived there?

A. About thirteen years

Q. 3. How old are you? A. Fifteen.

Q. 4. What is your occupation?

A. I couldn't say exactly what the occupation is?

Q. 5. What is your occupation now?

A. Well, I do clerical work for Mr. Harriman.

Q. 6. Clerical work? A. Clerical work.

Q. 7. Did you go to school?

A. I did. I went to high school. Now it is vacation, and I work during the summer.

Q. 8. You are just working on vacation?

A. I have worked a week and a half.

Q. 9. You attend high school now, outside of vacation period? A. Yes, sir.

Q. 10. Are you familiar with the section where the switch is designated on the map here? A. Yes, sir.

Q. 11. Do you live in the neighborhood? A. Yes, sir.

Q. 12. About how near to it? A. About 100 feet

Q. 13. Is it alongside, or opposite, or which direction?

A. It is on the western side, alongside.

Q. 14. Can you point out about where you live?

(Witness indicates with an F.)

Q. 15. Is that section well built up where you live?

A. It is not well built up, but then it is not sparse.

Q. 16. Well, on the side of the street where you were on, was that built up?

A. Well, the house borders on two streets, right through the lot; it comes to a point; then there is rows of houses on both sides, both streets right down.

The Court—Hobart Avenue and the street that runs off Bogart Avenue?

The Witness—No; Midland Avenue and Bogart Avenue; the front is on Midland, the back of the houses on Bogart.

Q. 17. This is Midland Avenue here?

A. That's Midland.

Q. 18. And this is Bogart. You say the house is on Bogart and Midland? A. Yes, sir.

Q. 19. How about the opposite side?

A. There is houses on the opposite side; there is six houses, but there is an empty lot right across from our house.

Q. 20. How about the other side of the switch, is that built up? A. What side is that, the east or west side?

Q. 21. The westerly side. A. Well, there is a lot—

Q. 22. I mean right across the way from the railroad on the other side? A. That's the eastern side.

Q. 23. Well, you may call it the eastern side.

A. There is another row of back yards bordering on the railroad track. There is a space about twenty-five feet, then come two tracks, then the switch on the other side running along with it.

Q. 24. I show you a photograph, Mr. Farrell; would you say that this was a reproduction of the location there?

10 A. Yes, sir.

Mr. Bain—Objected to on the ground the photograph cannot be proved in that way.

The Court—Yes, it can if it relates to the time. Have you got your photographer here?

Mr. Greenstone—He is not here; I could get him later. I wanted him to point out if that looks like the section.

The Court—Show it to Mr. Bain; tell him what the time is.

20 Mr. Bain—When was it taken?

Mr. Greenstone—November 8, 1916.

Mr. Bain—If the witness states that the photograph accurately shows the situation I won't have any objection.

The Court—About April 5, 1916.

Mr. Bain—Yes, I won't have any particular objection except as to whether or not there were as many cars on the date of the accident on the switch as appear in the photograph, and also any writing

30 on the photograph to be excluded.

The Court—We will rub that out; let me have the picture.

By the COURT.

Q. 25. Were you familiar with the conditions of that locality on or about the 5th of April? A. I was.

Q. 26. Now, look at that photograph and state whether that accurately, with the exception of the number of cars here, illustrates the situation, the way it looked at that particular point at that time? A. It does.

Q. 27. Now, what way would the camera be pointing when taking that photograph?

A. The camera would be pointing eastward, just exactly eastward.

Q. 28. What do you mean, towards the main tracks?

A. Like that direction would be looking east, and here is the switch, the cars are on.

Q. 29. Where is the main track?

A. The main track runs parallel with the switch.

Q. This street shown at the bottom is Bogart Avenue?

A. Here is Midland, there is Bogart running parallel with the tracks, or pretty nearly parallel. Here is the empty lot.

Q. 30. Where is the freight station; it isn't shown?

A. It is just left out.

Q. 31. It is at the very left of the picture? A. Yes, sir.

Q. 32. So this picture would show the condition existing about that time, to one standing on Midland Avenue looking towards the switch over Bogart Avenue in a northeasterly direction? A. Not a northeasterly.

Q. 33. That's the way it is on the map; look at the map and see the arrow there.

Q. 34. Well, the photograph is taken with the camera here, looking this way.

Q. 35. The photograph is looking directly east then, is it? A. Looking directly east.

The Court—Now, do you want to offer this?

Mr. Greenstone—Yes.

The Court—Do you want to cross-examine on it before it is offered, Mr. Bain?

Mr. Bain—No.

(Photograph received and marked Exhibit P-1.)

The Court—The witness indicates that this photograph was taken with the camera looking directly east from Midland Avenue. Now the street shown at the bottom is Midland Avenue, the next one running parallel with the railroad track shown there is Bogart Avenue. This is a vacant lot here, and this is the switch. The main tracks are shown behind the switch—the freight station would be a little to the left.

Q. 36. Did you ever play in and about the switch?

Mr. Bain—Objected to unless a time is fixed.

The Court—Wait until the question is completed.

Q. 37. (Continuing.) Between the cars before April 5, 1916, for a continuous period of about five years?

A. I did not.

Mr. Bain—I object.

The Court—He did not.

Q. 38. Well, did you ever play?

A. I did, but not for a continuous period of five years.

Q. 39. Well, for about how long a period?

A. Well, no period exactly.

Q. 40. I don't mean any existing continuous period, permanently continuous, but at intervals every day or so or once or twice a week for a few years?

A. Might have been once a month, because my mother—we lived right across the way at that time; I was smaller and I wasn't allowed on the cars. That's the only reason that kept me back.

Q. 41. When you grew larger, did you then go on the cars? A. I did.

Q. 42. Were there other boys that used to go on the cars? A. There were.

Mr. Bain—I object unless a time is fixed.

Q. 43. During that time? A. There were.

Q. 44. Was this place frequented by children so that they congregated and played there for quite a few years before April 5, 1916, for a continuous length of time.

Mr. Bain—Question objected to on the ground that it is leading.

The Court—It is very leading. Let me take the witness.

By the COURT.

Q. 45. You say that you have seen children playing for several years, playing around these cars in that locality for seven years prior to April 5, 1916? A. I have.

Q. 46. And that you have played there occasionally yourself? A. I have.

Q. 47. How many children at a time; what was the greatest number of children that you have seen playing there in that period of time at any one time?

A. I have seen as high as about fifteen to twenty.

Q. 48. And with what frequency did you see children playing there?

A. Very often—might have been that number; I have not seen very often, but a somewhat smaller number; I have seen as high as two or three times a week.

Q. 49. And what would they be doing when they would be playing there?

A. Why, playing tag, sitting up on the cars, throwing rocks, doing most everything outside of that.

Q. 50. Did you ever see them play trainman, brakeman?

A. I did not.

Q. 51. Did you ever see them play ball there?

A. Catch, not play ball.

Q. 52. They didn't do that on the tracks, did they?

A. Well, right on the side, on the runway, on the roadway very near the tracks.

By Mr. GREENSTONE.

Q. 53. Have you played there with other children before April 5, 1916, frequently, while railroad employees were working there?

Mr. Bain—Question objected to on the ground it is leading.

The Court—Well, I think I will permit him to answer that.

A. Not frequently, but quite often.

10 By the Court—Have you ever been driven off?

The Witness—I have been driven off about four times.

Q. 54. By railroad men?

A. From everything but a detective, and he used to come around at six o'clock at night, and we knew when he come so we wouldn't be there.

Q. 55. Did you see other boys driven off?

A. Other boys were driven off by this detective, very seldom by anyone else.

20

By Mr. GREENSTONE.

Q. 56. How many detectives did they have before April 5, 1916? A. You mean the Erie Railroad?

Mr. Bain—I object on the ground that there is no evidence that the witness knows how many detectives the railroad company had there, it is immaterial anyway.

Q. 57. As far as you know.

30 The Court—It would go to show how many men there were around there that had seen them. Do you know how many detectives there were there?

The Witness—I know but one that has been there more than once or twice. I don't recognize any others.

The Court—You wouldn't know whether they were detectives or not.

The Witness—I would not.

The Court—Well, now, was there any other man that you have spoken of as a detective that drove you off but this one man?

The Witness—No, sir.

The Court—You wouldn't know whether the others were detectives or whether they weren't?

The Witness—Once a long time ago, about five or six years ago, one man, he didn't exactly drive me off, but I saw him coming. I had an opinion that he was a detective and I ran, that's the only time that I ever remember.

By Mr. GREENSTONE.

Q. 58. Do you know whether they used to have more detectives than on April—

The Court—I sustain the objection. The witness has already said that he had no way of knowing, which must be the case. Detectives don't go around with badges, you know, they are supposed not to let people know what they are.

Q. 59. Have you ever seen them switch cars in there? A. I have.

Q. 60. How did they do the work?

A. How did they switch the cars?

Q. 61. Yes. A. Why, generally they would send out a man and then back in the engine, usually with a couple of cars on it, they would hitch on to the others and pull them out and put what was supposed to go in there that day afterwards.

Q. 62. When you say generally they would send out a man, where would they send the man? A. Between the fence.

Q. 63. Can you point out on this map? A. I can.

Q. 64. Do so. A. Generally about here.

Q. 65. About where the yellow cross is?

A. Yes, and often just about here.

Q. 66. Where?

A. According to this map I cannot show it, there is two railroads and this and a short cut.

Q. 67. Here is the fence, here is the freight house, in what position would this man be to those two relative bodies?

A. More often here than here, but very often here.

Mr. Bain—More often where the yellow cross is than a point about thirty or forty feet west of the yellow cross?

The Witness—Yes, sir.

Q. 68. Did you see them switch cars in there without sending a man?

Mr. Bain—Objected to.

The Court—Objection sustained, the same question asked before, I assumed that you did not take an exception before because you thought the Court's ruling was correct; if you did, don't repeat it.

Plaintiff's counsel asks an exception, which is hereby allowed and sealed accordingly.

(Sealed.)

Q. 69. From where you house is could you see children opposite you playing there by the switch?

The Court—He has already stated so.

Mr. Greenstone—I beg your pardon, question withdrawn.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 70. Did you see children chased away from the switch by anybody? A. I have not, very often.

Q. 71. Who would chase them away?

A. The man that sealed the cars once in awhile.

Q. 72. That's the freight agent?

A. I wouldn't consider it chasing them away, he would

just say something to them, "Get out of here," and that was all he would say; generally they wouldn't go.

Q. 73. Was that the freight agent?

A. No, I don't know as there is a freight agent up there.

Q. 74. Well, you say that was done by the man who sealed the cars? A. By the man who sealed the cars.

Q. 75. He was a railroad man, wasn't he?

A. He was a railroad man.

Q. 76. Who else did you see chase the children away?

A. Turco, the detective.

Q. 77. Railroad detective? A. Yes, sir.

Q. 78. Who else did you see chase the children away?

A. Nobody.

Q. 79. Ever see Officer Maitland or any policemen chase them away? A. I cannot recollect if I did.

Q. 80. Ever see any other railroad men chase children away?

A. Well, I have a vague impression that they have been chased away, but I cannot state that.

Q. 81. What do you mean by vague impression?

A. Well, I have lived there so long and I never paid any particular attention to it. It is a common, every-day occurrence, everything that goes on around there and I haven't paid any particular attention.

Q. 82. Well, was it an every-day occurrence for children to be chased away?

A. To be around there, to be told to get out of there, and if they didn't go they weren't chased away.

Q. 83. Well, they were told to get out of there every day, weren't they? A. No, sir, not to my knowledge.

Q. 84. You weren't there every day, is that what you mean?

A. Well, I was there most all of the day; I lived there.

Q. 85. Didn't you most every day see children chased away from the switch?

A. Not chased away, just told to get away.

Q. 86. Would they? A. No, sir; they were kids.

Q. 87. They were what?

A. I mean they were children; they wouldn't go unless you chased them.

Q. 88. They were the kind of children that wouldn't go unless— A. Unless they were really chased away.

Q. 89. Unless taken bodily out?

A. If given three or four warnings they would go, give them a little scare.

Q. 90. What do you mean, give them a little scare?

A. Well, possibly tell them twice.

Q. 91. You think they would be scared if told twice, and would not be scared if told once? A. Yes, sir.

Q. 92. Now, when they were told to get away, sometimes they would throw stones at the man who told them to get away? A. Not that I saw them.

Q. 93. Did you get away when you were told to get away?

A. Well, I wasn't there so very often, the fact that I wasn't told to get away by the Erie, but by my father, I generally went away then.

Q. 94. Didn't you go away when anybody else told you?

A. Only once or twice I have been told to go away, because I have not been there often enough.

Q. 95. But when you were told to go away by men other than your father you went away, didn't you?

A. Not always.

Q. 96. But you did sometimes? A. Sometimes.

Q. 97. And you saw other children go away sometimes when told to go away?

A. That's according to the kind of children.

Q. 98. Well, now, what kind of children wouldn't go away when they were told?

A. Well, you know the difference in children.

Q. 99. Just what kind of children, as near as you can describe them, would not go away when they were told?

A. Well, what you call the little brats, as they call them.

Q. 100. The kind of children that nobody can control, is that what you mean?

A. No, sir; just what you call the American boy.

Q. 101. Wouldn't obey anybody?

A. No, sir; they will obey their father.

Q. 102. Don't obey their father?

A. They do obey their father to a certain extent.

Q. 103. He is the only one they will obey?

A. No, sir; they will obey the others if they get enough warning, if they think there is a penalty behind it.

Q. 104. Ability behind it? A. A penalty.

Q. 105. In other words—

A. If they think they are not going to get anything for it, they won't go because they are having a good time.

Q. 106. Yes, if they think they are not going to be whipped they won't go away?

A. Not whipped; they might have been taken by the collar and threatened to be put in jail. All this and that; they are afraid of that, but they are not afraid if they are just told to get away, no boy is.

Q. 107. So that knowing that they were not wanted there they would not go away?

A. They knew they were not wanted there.

Q. 108. Oh, they did? That's all.

A. They knew they were not wanted there, but still they were having a good time.

By the COURT.

Q. 109. Let me ask you one or two questions about this photograph. I see from Bogart Avenue what looks like a roadway leading into the tracks, is that right?

A. Yes, sir.

Q. 110. Then is there a roadway running along the side of the tracks, a driveway? A. Right here?

Q. 111. Yes, where the people drive in to take the freight out of the cars that are put on the siding, is that right?

A. Yes, sir.

Q. 112. Now, then, there is what you call the open space; it seems to be a depression of some kind there?

A. Just a little.

Q. 113. But it is a depression, the ground is lower there?

A. It goes, sort of a little hill.

Q. 114. Is it cup-like?

A. No, not exactly; I cannot explain it.

Q. 115. Well, it is slanting? A. It is just slanting.

Q. 116. So that the driveway alongside of the track is higher than the street, that is Bogart Avenue?

A. Yes, sir.

Q. 117. That's right, is it? A. That's right.

Q. 118. How much higher is it?

A. About eight feet—no, six feet above.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 119. Would that be a gradual depression?

A. Well, at the southern end it is gradual, at the northern end it is rather abrupt.

Q. 120. By the southern end you mean the end towards the house? A. Yes, sir; the southeast.

The Court—How wide is that driveway, did you say, alongside of the track?

The Witness—Fifteen to twenty feet, possibly more, twenty-five feet, I should say.

The Court—The driveway alongside of the track?

The Witness—Yes, sir.

The Court—Just indicate in this room some two points that you think would be the distance.

The Witness—Why, from here to the end of that post at the gate some places, and some places narrower, and other places still wider. That's about it

as near as I can judge right to the edge of the track to the incline is about twenty to twenty-five feet.

RE-CROSS EXAMINATION, by Mr. BAIN.

Q. 121. That driveway alongside of the switch you speak of was used by wagons to get in to take freight from the cars and put freight into cars, wasn't it? A. Yes.

Q. 122. That's all.

ISABEL FARRELL, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Mrs. Farrell, where do you live?

A. I live in the City of Garfield.

Q. 2. With relation to the localities shown on that map, where would your house be?

A. Well, it is about 120 feet back from the corner, between the two streets.

Q. 3. You mean between these two streets?

A. Between Bogart and Midland.

Q. 4. About 120 feet back here? A. Yes, sir.

Q. 5. You are the mother of Norman Farrell, are you?

A. Yes, sir.

Q. 6. How many children have you, Mrs. Farrell?

A. I have five.

Q. 7. Five? A. Five children.

Q. 8. Is that section of the town pretty well built up?

A. Well, it has been recently, it was for a number of years very spare.

Q. 9. Years ago it was spare and has been built up recently? A. Yes, sir, very recently.

Q. 10. Well, how recently would you say; the past three or four years?

A. Well, in the last four years it has built up very much.

Q. 11. How far is this place from the City Hall?

Mr. Bain—I object, if your Honor please.

The Court—What is the purpose of that?

Mr. Greenstone—I just want to show the central locality.

The Court—The City Hall may not be the central locality by any means.

Mr. Greenstone—I guess I had better do it more direct.

Q. 12. How near the center of the town would you say this was?

Objected to.

The Court—It cannot do any harm.

A. How near are we to the center of the town?

Q. 13. Yes. A. Well—

Q. 14. Are you near the station?

A. We are much more easterly than westerly.

Q. 15. About how much of a population have you there, do you know, Mrs. Farrell?

A. Well, I think 20,000—18,000 or 20,000.

Q. 16. And are you nearer the Garfield Railroad Station?

A. Yes; I think we are about 500 feet.

The Court—What do you mean, the freight station?

The Witness—No, the passenger station.

Q. 17. Are you near the passenger station? A. Yes.

Q. 18. How long have you lived there, Mrs. Farrell?

A. I have lived in Garfield about thirteen years next September.

Q. 19. How long have you lived in that house?

A. Well, twelve years the 11th day of next July.

Q. 20. Have you known children to congregate and play about where this section is shown on this map?

Objected to unless—

Q. 21. Before April 5, 1916, for say a period of—

The Court—No, let it stand that way, then we will ask her how long afterwards.

Q. 22. Before April 5, 1916?

A. Oh, very often; very often; every day children play there.

The Court—For how long a period of time did that continue prior to April 5th to your knowledge?

The Witness—Why, that would be ever since I have been there .

The Court—Well, that would be thirteen years?

The Witness—About eleven years.

Q. 23. Have you ever seen them switching any cars there?

A. Yes, I have, once or twice a day.

Q. 24. And have you ever noticed what they did before they sent in a line of cars in that switch?

Objected to.

The Court—What is the purpose?

Mr. Greenstone— To show the manner in which they worked around there.

A. Well, I would say—

The Court—Wait a moment, I have already ruled on that twice, I overrule it for the same reason, you cannot prove negligence by proving what they did at some other time which was quite unconnected with what they may have done at this time.

Q. 25. Now, Mrs. Farrell, on April 5, 1916, did you see anything relative to this boy's injury, this little boy here?

A. Well, I saw him after he had his limb cut off.

Q. 26. Just tell the Court and jury what you saw.

A. Well, I was lying ill on the couch in my dining-room and I heard a very loud crash of cars bumping up against the block and I got up very quickly, that struck me that someone was killed, because I had heard this crash before—

The Court—Never mind what you thought, just tell what you saw.

A. (Continuing)—Then I got up and rushed out and went outside of my own lot and stood on the sidewalk where a vegetable man was standing.

The Court—That would be on Bogart Avenue?

A. (Continuing)—On Bogart Avenue. I looked up and saw a little boy lying there, and I spoke to the vegetable man there to go up, and he said no, he couldn't stand the sight of blood, and he wouldn't go up. Then I stood there, and I didn't dare to go up myself, so I stood there for perhaps a minute or two minutes, and I saw a rather stout man going along from the easterly direction and turning down at the fence, the corner of the railroad track, and going right down from there, and I thought he stood there and saw the boy, and he stood and looked directly at the boy I thought, and I got provoked because he did not go along, and I yelled at him quite loud, "Go to that child," so I couldn't get Mr. Kelly to come down and go to the boy so I made him go. When I yelled at him he went back—he was half way down this lot, he turned back and went to the boy. Then I turned to Mr. Kelly and said, you run for a physician quick, there is a telephone down there, you telephone for a physician, and he made for that house and telephoned, and the physician got over at the depot just about as quick as he got the boy there. Then I remember of seeing him carry the child up, go right on up you know to the track, and the little limb was dangling down on a thread, I could see that much from where I stood, but I didn't dare go for I was too nervous.

The Court—Now, just one moment, which house do you live in, the second from the fence?

The Witness—I am right at the corner.

The Court—You are the first one?

The Witness—Yes.

The Court—Now, when you came out in the street, looked over the fence, you saw the little boy lying on the track?

The Witness—Yes, I saw him from the porch.

Q. 27. Now, what vegetable man was it you asked?

A. Mr. Kelly.

The Court—Do you see him in court?

The Witness—He is not here to-day.

The Court—Do you see that gentlamen away over in the corner?

The Witness—Yes, but he is the other; Mr. Kelly was the proprietor.

The Court—He is not the man you refer to?

The Witness—No, he was not in sight, but it was himself, because he tells me he was the man, but I wasn't close enough to recognize him as the man that I yelled to; I think he was a corporation man.

Q. 28. Can you tell whether he was the man that stood near the fence and then walked over to the child?

A. Yes, he stood at the fence about a second as though contemplating whether he would go along to the child or not, then he went down; suddenly when half way down between the railroad and the street I yelled, "Go to that child," and so he went, and I turned away from that to pay attention to getting a physician. I didn't see what was done after, only I saw the man walk straight up with the child dangling on his arm.

Q. 29. Now, from where you stood, could you see the child as it lay under the—or near the car?

A. I saw it about a foot from the car, I should judge, laying right between the walk—he laid this way between the two wheels, the back wheels of the forward car.

Q. 30. You mean the rear wheel of the forward truck?

A. Of the truck, yes.

Q. 31. That is the two wheels of the truck on each side?

A. Yes, sir.

Q. 32. On the side towards the street is that, the side you are speaking of?

A. Yes, the side towards the street, certainly, but laying on the little walk outside of the car.

Q. 33. And it was the rear wheel of the forward truck?

A. The rear wheel of the—

Q. 34. Of the front truck?

A. Two or three, I can't say whether there were three cars there or not.

Q. 35. No, what I mean is, was it the rear wheel of this particular car, the forward truck?

A. Yes, the rear wheel.

Q. 36. So it was the rear wheel of the front truck?

10 A. Yes.

The Court—What do you mean by the front truck?

The Witness—Well, that's what I can't understand now, which is the front, there is the block.

The Court—I didn't think you quite understood it possibly unless you know which is front and which is rear; was it the truck that was nearest the freight station, or the one away from the freight station?

20 The Witness—Well, the one farthest from the freight station, back towards the engine.

The Court—Now, will you go over to the map and mark with an F where you think, as near as you can, you saw that little boy lying.

(Witness indicates with F-1.)

The Court—How far was he from the track, that is the side of the track?

The Witness—From the car you mean, about a foot, perhaps more.

30 The Court—That's the best you can judge from where you were; it looked about a foot?

The Witness—Yes, he was very close.

Q. 37. You mentioned that you had seen children playing before April 5, 1916, and congregated there. Was that done while railroad employees were present?

A. Well, not always when the freight was standing there, why, the children would go up and play around, and even when railroad employees were there, too, I have seen the children playing very often.

Q. 38. Were there children of all ages or of certain ages?

A. They would average from five and six to twelve, sometimes a little older. Once in awhile I would see some very large boys get up and run along the tops of the cars from one to another, which made me very nervous, for I used to go out and tell them to get down.

The Court—Never mind that.

Q. 39. Here is a photograph, Mrs. Farrell; does this seem to be the section opposite your house?

The Court—You proved it once no use of proving it again; I overrule the question.

A. Yes, that's the—

Mr. Greenstone—I withdraw the question.

Q. 40. What was the thing that drew your attention first to this incident?

The Court—She has already stated she heard a heavy knocking together of the cars.

The Witness—The crash of the cars.

Q. 41. Was it a usual one there, a usual crash?

A. It was unusual, loud, unusually loud.

Q. 42. Did you see any other men approach this man who held the child there? A. No, I did not.

Q. 43. Well, how long did he stand there before the child was taken away? A. Well, perhaps from three to five minutes.

Q. 44. What occurred then? A. Why, he walked up to the depot.

Q. 45. You were going for the child, were you?

A. No, I sent the vegtable man for the child, Mr. Kelly, to go down and 'phone for a doctor that there was an accident.

Q. 46. Well, your attention was directed elsewhere, someone may have approached.

Mr. Bain—I object.

Objection sustained.

Q. 47. Are you certain that the man stood there for a period of at least three minutes?

Objected to.

Q. 48. And you saw no one else appear there?

Objected to.

The Court—What difference does that make?

Mr. Greenstone—To show that the railroad employees were not in the neighborhood when this switching was done, in the immediate neighborhood where this happened and the switching occurred right into this point. Now, the proper way for the doing of this work would have been to have a rear—

Mr. Bain—I object to this before the jury.

The Court—It does not make any difference, go ahead, state what your point is.

Mr. Greenstone—And I want to show that there was no proper switching in of the cars at that time, if there had been a proper supervision at that time of the switching in they undoubtedly could have seen the children there or this boy there because he was located—

The Court—What do you want to prove, that there was no person around there where the cars came together?

Mr. Greenstone—Yes.

The Court—All right, she has already proved that she saw nobody around there, haven't you?

Mr. Bain—She was lying on a couch when the crash came, your Honor, couldn't see anybody.

The Court—How soon did you get up after you heard the crash?

The Witness—I got up immediately, there wasn't anybody in sight.

The Court—How long was immediately?

The Witness—About two minutes.

The Court—Did you see anyone around?

The Witness—I saw no one, I was perfectly helpless, wringing my hands.

The Court—You didn't see anybody come around there with the exception—

The Witness—I saw a flagman come and stand for a minute, and the child lying there hurt, and he stood between the space near the edge of the forward car and he stood there as though listening and he went back to the engine and he didn't go to the child.

The Court—How far was he from the child?

The Witness—Why, he was—here was the child here, here was the car where they moved forward, he come right to the edge of the car and stood there as though listening, then went quickly away.

The Court—Do I understand that the cars were not all coupled?

The Witness—No, they were not coupled, they pulled them away from the car where the child lay, they pulled all the forward ones away and a long space of about the length of a car between them and they were still moving.

The Court—They were pulling cars out?

The Witness—Yes, pulling them that way.

The Court—Which way?

The Witness—Towards the engine.

The Court—Away from the freight station?

The Witness—Away from the switch.

The Court—And there was about a car's space between?

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The Witness—About a car's space between.

The Court—The last car which was coupled to the engine and the car near which the boy was lying?

The Witness—Yes, and I saw the man with the red flag which attracted my attention. He come there and stood, and I felt he should go over to the child right away.

The Court—What did he do?

The Witness—He went right back, he listened and then went quickly forward towards the engine; there was no one there.

The Court—Where did he come from, what direction?

The Witness—He came from the engine.

The Court—Were the cars coupled at the time he came up there?

The Witness—No, they weren't coupled, they were separated.

The Court—When he got there?

The Witness—When he got there, because I couldn't have seen him between them if they hadn't been separated. He was standing on the opposite side, on the east side of the track.

The Court—All right.

The Witness—He was the only one of the employees that I saw, was the flagman.

Q. 49. About how many cars were left standing there that you saw?

A. Well, there were two or three, I cannot say that there were three because I didn't count them, I was too excited; there was only two anyhow, I am sure of two.

Q. 50. That is all.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 51. Mrs. Farrell, did you often see children chased away from the switch?

A. No, I cannot say that I ever saw children chased as they should be from the Erie tracks.

The Court—That was not the question he asked; did you see them chased away?

The Witness—No. That's the way I feel about it, but I never saw them taken care of at all.

Q. 52. You did see them chased away?

A. Never saw them chased. In the twelve years I have been there I never saw a child chased.

Q. 53. You mean to say you never heard anybody tell the children to get away from the cars?

A. I wasn't near enough to hear what they said, but about three times in twelve years I saw what I would call a workman around there. An Erie man said to the children to get away, but I didn't see him chase nor run after a child nor take him by the collar.

Q. 54. Well, you did see some of the railroad men tell the children to get away from the cars and switch?

A. Yes, about two or three times in all that time.

Q. 55. You didn't let your boy Norman go play around the cars?

A. Well, I think I was so close there that I could take better care of my children than others that lived a distance. Every woman cannot tell what their children do when away from home. There ought to be some care for little helpless children.

Q. 56. Never mind that, you did take your boy Norman away?

A. I didn't have much trouble, he is a very obedient child.

Q. 57. But you warned him not to play around the switching cars?

A. Yes; I had two other boys before him to keep away.

Q. 58. And you kept all your boys from palying around the switch? A. Not always.

Q. 59. No, but you did what you could?

A. I did the best I could.

Q. 60. Didn't you see men, other than railroad men, chasing the children away?

A. Oh, yes, some of those that unloaded things there from the track; I have heard them speak occasionally.

Q. 61. When was that?

A. Men unloading from wagons to cars would holler to the boys to get away.

Q. 62. That is men who were unloading freight into the freight cars? A. Yes.

Q. 63. They told the children to get away?

A. Sometimes I have heard them, yes.

Q. 64. And didn't you sometimes hear the police officer tell the children to get away?

A. No, I cannot say that I ever saw the police officer.

Q. 65. Have you ever seen the police officer around while the children were playing?

A. I have seen him walking up and down, but don't recollect seeing him speak to the children.

Q. 66. Then it is true that the children were warned away from the switching cars?

A. Yes, very seldom; I will say seldom.

Q. 67. But they were warned away? A. Yes.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 68. Mrs. Farrell, when you saw this thing, when you went out and looked out, was there anyone else beside this little boy there?

A. Why, yes, there was a small child stood by him when I saw him lying there, and the little fellow was wringing his hands and didn't know what to do.

Q. 69. Well, how far away was he from him?

A. He was standing right close to the child, about a foot, and the little boy was crying.

Q. 70. What did the little boy do then?

A. Well, he ran in that direction, towards Passaic Street.

The Court—Towards the station?

The Witness—No, down Bogart Avenue; then I didn't see him after that.

RE-CROSS EXAMINATION, by Mr. BAIN.

Q. 71. Do you know the name of the other little boy, Mrs. Farrell, that you saw?

A. No; I heard reports of him being a neighbor's nephew, but I don't know the name of the child.

Q. 72. You don't know his name? A. No.

Q. 73. A nephew of whom? A. Mr. Quincy's.

Q. 74. A nephew of Mr. Quincy?

A. A nephew of Mr. Quincy.

Q. 75. Where is Mr. Quincy?

A. He lives on Palisade Avenue.

Q. 76. In Garfield? A. Yes.

Q. 77. Was the little boy larger or smaller than the little Hilt boy? A. Smaller than the boy that was hurt.

Q. 78. Smaller than the boy that was hurt, was he?

A. Yes.

ESTHER FARRELL, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Miss Farrell, how long have you lived in Garfield?

A. Thirteen years.

Q. 2. And was the lady who just left the stand your mother? A. Yes, sir.

Q. 3. And you live with your mother? A. Yes, sir.

Q. 4. You are acquainted with the section shown on the map? A. Yes, sir.

Q. 5. Have you seen children often congregate and play before April 5, 1916? A. Quite often.

Q. 6. In that section? A. Quite often.

Q. 7. Children of all ages or certain ages?

A. Well, about twelve, sometimes fifteen.

The Court—What do you mean, twelve and fifteen in number or years?

The Witness—Years old. From six to twelve and sometimes fifteen.

Q. 8. Where were you on April 5, 1916?

A. In the house.

Q. 9. What do you know about this little boy's being hurt?

A. Well, I heard the crash; I heard an awful crash.

Q. 10. Just before he was hurt?

The Court—Go ahead.

A. Then my mother got up and went out, and I went out, and I saw the little boy lying alongside of the track, alongside of the train, the box car.

Q. 11. About how many cars were there?

A. Well, I don't know exactly.

Q. 12. Two or three?

A. Yes, I guess that's about what there were.

Q. 13. Was he lying towards you or away from you?

A. Towards this way on the outside, lying on the walk

Q. 14. Was his head towards you?

A. He was sitting up.

Q. 15. Sitting up? A. Yes, sir.

Q. 16. And where were his legs?

A. I don't know; I couldn't see them.

Q. 17. They were away from you?

A. I guess they were; I don't know.

Q. 18. Was there anyone else besides this little boy there?

A. There was a little boy standing beside him.

Q. 19. Was he a smaller boy or a larger boy?

A. Smaller.

Q. 20. Do you know who this little boy is?

A. Well, I don't know, but I heard his name was Christy.

Q. 21. Have you seen children playing there before April 5, 1916, for—

The Court—She has already answered that.

Mr. GREENSTONE.

Q. 22. During the times that you have seen children playing there was there a railroad man there?

A. The only one I saw chase them was the checker.

Q. 23. Not chasing. I mean were there railroad men there? A. No, not that I know of, only the checker.

Q. 24. You say the only man was the checker? A. Yes.

Q. 25. Did you ever see the train crew switch in there?

A. Yes, sir.

Q. 26. And would children play around while the switching was going on? A. I cannot say exactly.

Q. 27. Well, do you remember ever seeing the cars moving and children playing?

Objected to.

A. I have seen them pass, but I cannot remember of seeing them play.

The Court—I think I will sustain that objection; it has no bearing on the case at all.

Q. 28. Well, then, while the children were playing there, have you ever seen a railroad man there, an Erie Railroad man there?

A. Not that I know of, only the checker, and I may have seen an agent.

Q. 29. Well, when the switching was being done, the crew were there, weren't they? A. Yes, sir.

Q. 30. You saw them?

A. Well, I saw one or two of them; I didn't see them all.

Q. 31. And would the children be playing around then?
A. Not that I know of.

Q. 32. Well, would you see children playing around then?
A. Not while the trains were coming in.

Q. 33. But you would see plenty of children at other times? A. Yes.

Q. 34. When the trains were not moving, is that it?
A. Yes, sir.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 35. You say that you first heard the noise as of the cars coming together? A. Yes, I did.

Q. 36. And you were in the house then, were you?
A. Yes, sir.

Q. 37. What were you doing?
A. I was washing the dishes.

Q. 38. In the kitchen? A. Yes, sir.

Q. 39. That was in the rear of the house? A. Yes, sir.

Q. 40. Just before that time did you hear the noise of a train? A. No. You mean before the crash?

Q. 41. Yes. A. Well, I cannot recollect.

Q. 42. Did you hear some noise of a train going by before that? A. No, sir.

Q. 43. Well, didn't you know that a train was coming at that time? A. Well, I don't remember.

Q. 44. You don't remember? A. No, sir.

Q. 45. You were busy with your dishes and weren't paying attention to anything, were you? A. No, sir.

Q. 46. I notice you smile when I ask you that question; that was the truth, wasn't it? A. Yes, sir.

Q. 47. You were busy with your dishes and weren't paying attention to anything else? A. No.

Q. 48. You heard this crash, you saw your mother run out and you ran out? A. Yes, sir, I did.

Q. 49. And you went over to where the little boy was lying?

A. No, I didn't go over, I stood right near the house.

Q. 50. You stood right in the house? A. Near the fence.

Q. 51. And how far were you then from the boy when you got to your fence?

A. About, I was in our yard on the sidewalk, it must be about 100 feet, I guess.

Q. 52. About 100 feet from the boy? A. Yes.

Q. 53. And you saw the other little boy near the Hilt boy?

A. Yes, sir.

Q. 54. And what did the other little boy do that you saw?

A. He was all excited.

Q. 55. What did he do?

A. I don't know, I think I turned arou[illegible] didn't see him go away—when I turned around he w[illegible] gone.

Q. 56. You have seen children chased away from the switch, haven't you?

A. I have seen the checker chase them, he just told them to get away from the car when they were getting freight.

Q. 57. That is, you saw the freight checker chase them?

A. Yes.

Q. 58. Didn't you sometimes see others chase them away?

A. No Erie employees, I might have seen other people do it, but not Erie employees.

Q. 59. What other children have you seen?

A. I have seen men sometimes holler at them, my mother used to holler at them, told them to get away.

Q. 60. The police officer sometimes chased them?

A. No, I never have seen him down that way.

Q. 61. Oh, you never saw the policeman down that way?

A. No, not down by the cars.

Q. 62. Not down by the switch, you never saw the policeman down by the switch?

A. I may have, but I cannot remember.

Q. 63. And you are not sure now but what you may have seen the policeman chase children away from the switch

and you don't remember it? A. No, I don't remember it.

Q. 64. What you mean to say is you have no distinct recollection at this time? A. No, sir.

Q. 65. Now, who else besides the train checker and your mother did you see chase children away?

A. Well, once or twice I hollored at them, too.

Q. 66. Oh, you used to holler at them; you wouldn't play around the tracks, would you? A. No, sir.

Q. 67. Who else besides yourself used to chase the children away? A. I can't remember.

Q. 68. Did some other men?

A. Maybe they did, I don't remember.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 69. About how long did this man hold this child?

A. Well, I don't remember.

Mr. Greenstone—If the Court please, we have two more witnesses, one of them is engaged in the Hackensack Court, he was subpœnaed some days ago, he is supposed to come here at two o'clock and the other

The Court—What is detaining him?

Mr. Greenstone—They are both officers, one is is supposed to arrive also with him.

a captain and the other is a police officer.

The Court—What are they going to testify to?

Mr. Greenstone—To practically the same condition existing as to children playing there for a number of years. One of them, Captain Boyle, was right in the neighborhood, lived there and saw that condition for many years.

The Court—Well, that is merely cumulative testimony. Is that all the testimony you have?

Mr. Greenstone—That is all.

The Court—Are you going to rest your case, then?

Mr. Greenstone—Yes.

The Court—All right.

Mr. Greenstone—I want to show this little boy.

The Court—Do you want the little boy to testify?

Mr. Greenstone—Yes.

The Court—All right; call him; I asked you if you had completed your case.

Mr. Greenstone—All but this little boy.

The Court—All right, call him.

EDWIN HILT, JR., called.

Mr. Hobart—I think before he is sworn some inquiry should be made whether he understands.

By the COURT.

Q. 1. How old are you, Eddie? A. Seven months old.

Q. 2. Do you go to school? A. Yes, ma'am.

Q. 3. How long have you been going to school; did you go to school before you were hurt?

A. (Witness shakes head yes.)

Q. 4. You have been going to school after you got well, have you? A. Yes, ma'am.

Q. 5. Do you go to Sunday School? A. Yes, sir.

Q. 6. Do you know if you are told to tell the truth and do not tell the truth what would happen to you?

A. We go down to the devils.

By Mr. HOBART.

Q. 7. What Sunday School do you go to Eddie?

A. Presbyterian.

Q. 8. Do you learn that in the Presbyterian Sunday School? A. Yes.

The Court—Good Presbyterian doctrine.

Q. 9. How long have you been going to Sunday School?

A. I don't know.

Q. 10. Well, did you go before you were hurt?

A. No, I started when I was hurt.

Q. 11. You started after you were hurt? A. Yes.

Q. 12. Did anybody tell you to say that, that you would go down to the devils if you didn't tell the truth? A. Yes.

Q. 13. Who told you to say that? A. My daddy.

Q. 14. When did he tell you to say that?

A. I don't know.

Q. 15. To-day or yesterday?

A. I don't know when he told me, it was long ago.

Q. 16. It was what? A. It was long ago.

Q. 17. How long ago? A. I don't know.

Q. 18. Did he tell you to say that if you were asked that question when you were in court?

A. No, he didn't tell me that.

Q. 19. Oh, he didn't tell you that; well, what did you mean by telling me a moment ago that that's what he told you?

Mr. Greenstone—If your Honor please, that's quite a question even for an older man.

The Court—No, he may answer.

Mr. Hobart—Don't be afraid; answer the question.

By the COURT.

Q. 20. Eddie, when did your father tell you to say that?

A. He just told me if we tell any lie we will go down to hell.

Q. 21. He didn't tell you to say it, but he told you if you ever told any lies you would go to hell, is that right?

A. Yes.

By Mr. HOBART.

Q. 22. Did your father tell you what hell was? A. No.

Q. 23. What is your idea of hell; what will happen to you there? A. You go in the big fire.

Mr. Hobart—Some more good Presbyterianism.

The Court—I think he may testify.

By the COURT.

Q. 24. Do you know what that book is, Eddie? A. No.

Q. 25. That is the Bible; do you know what the Bible is? A. Yes.

EDWIN HILT, JR., sworn at this point, and testifies as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 26. What is your name? A. Edwin Hilt.

Q. 27. Where do you live? A. 96 Palisade Avenue.

Q. 28. Garfield? A. Garfield, N. J.

Q. 29. Do you know what happened to you on April 5, 1916? A. Yes, sir.

Q. 30. Just tell the Court and Jury what occurred?

The Court—Just what happened?

A. I was playing miggles by the freight, and one of the miggles went under the train.

By the COURT.

Q. 31. That's the little boy's name—oh, you were playing marbles? A. Yes.

Q. 32. Where were you playing marbles, by the trestle? A. By the trestle.

Q. 33. By the track? A. Yes, sir.

Mr. Hobart—By the trestle, he says.

Q. 34. What do you mean by the trestle?

A. By the switch.

Q. 35. By the switch, all right.

A. (Continuing) And so one of the miggles went under went under the train and I reached my hand to get it and my hand wasn't long enough so I reached my foot to get it, then I had it close to the edge, I wanted to pull it out further and then the train came back.

Q. 36. Then what happened? A. Ran my leg off.

Q. 37. Then it ran over your leg? A. Yes.

Q. 38. How many cars were standing there when you were playing miggles? A. I didn't count them.

Q. 39. Was the car that you put your leg under to get your marble nearer the freight station than the other cars, or was it in the opposite direction?

A. It was by the fence further.

Q. 40. Was there any other car further up towards the fence than that?

A. Yes, more cars, a whole lot of them.

By Mr. GREENSTONE.

Q. 41. Was there anybody else playing with you?

A. Eber Christy.

Q. 42. Is he a bigger boy than you or a smaller boy?

A. It is a little boy.

Q. 43. And did anybody tell you to get away from there?

A. No.

Q. 44. Are you sure about that? Nobody went over to see you at all? A. Where?

Q. 45. Just before you were hurt.

By the COURT.

Q. 46. Did you see any railroad men around there?

A. No, only the Kissler that picked me up and held me for four minutes, and then that there man over there, Kissler, give me, I mean Kissler give that man, I mean—

Q. 47. Now, had you seen any railroad man there before you were hurt? A. No.

Q. 48. Before you say the train moved, did anybody say anything to you? A. No.

Q. 49. Did you hear anybody shout? A. No.

Q. 50. Did you hear any whistle blow on the railroad engine? A. I didn't hear the engine at all.

Q. 51. Well, when you were playing marbles there, before you put your foot under the car, did you see any engine? A. No, I didn't see no engine at all.

Q. 52. Well, had you been looking around to see whether there was anybody there or not? A. No.

Q. 53. You hadn't been looking around? A. No.

Q. 54. Well, when you first came there did you look around? A. No, I didn't look around at all.

Q. 55. I mean when you went there to play, did you see where you were going to play? A. Yes.

Q. 56. And did you look around you?

A. No, I didn't look around.

Q. 57. Was everything quiet? A. Yes.

Q. 58. Was there nobody near you, no men near you?

A. No.

By Mr. GREENSTONE.

Q. 59. Just you and that little boy alone? A. Yes.

By the COURT.

Q. 60. How near were you to the car when you were playing miggles? A. I was close to it.

Q. 61. Were you underneath it?

A. No, I wasn't underneath it.

Q. 62. You weren't on the track? A. No.

Q. 63. You were alongside of the tracks? A. Yes.

Q. 64. Then when your marbles went—

A. Under the train.

Q. 65. You reached under it to get it, is that right?

A. Yes.

Q. 66. You couldn't reach it with your hand, is that right? A. Yes, sir.

Q. 67. So you put your foot under it?

A. I put my foot under it to get it, then I had it close to the edge and I wanted to put it further, and the car came back and took my leg off.

Q. 68. How long had you been playing marbles there before you were hurt? A. About an hour.

Q. 69. Had you seen any train back in there, Eddie?

A. No.

Q. 70. You hadn't seen any cars back in?

A. No, I hadn't.

Q. 71. That's all.

CROSS-EXAMINATION, by Mr. HOBART.

Q. 72. Had you playe dmarbles around there before?

A. No, I didn't go near there before.

Q. 73. That was the first time you had been near there, was it? A. Yes.

Q. 74. Did you ever play around the cars before?

A. No, only crossing the tracks for my father to go up to the firehouse somewhere.

Q. 75. Had you ever been chased away from there?

A. No.

Q. 76. Did your father know you were going there to play marbles this day? A. No, nobody knew it.

Q. 77. What time of day did it happen?

A. The hour that I come home from school; I had to go to school.

Q. 78. It was after school, was it?

A. I had to go again, that was in the afternoon.

Q. 79. It was during noon recess? A. Yes.

Q. 80. Had your father ever told you to keep away from the cars?

A. No, he didn't tell me to keep away from the cars, he only told me—

Mr. Greenstone—If your Honor please, I object to it at this time as not proper cross-examination?

The Court—Why?

Mr. Greenstone—Nothing was said on direct.

The Court—That may be, but we are dealing with—where a child is a witness indicating his own actions and conduct, we would always be open to

the inquiry as to whether he was guilty of contributory negligence or not; now a child of this age, what would be contributory negligence for an elderly person or mature person would not be for this child, so we must necessarily go into the inquiry as to whether the child knew that to be near that train and so forth was dangerous. Now, one of the ways that that could be determined, and probably the very best way, would be whether or not his father had told him to stay away from there because we all know that a child looks to a parent for guidance as to his conduct in what he should do, and if the father had told the child that it was dangerous to be around a railroad train, the child following the natural instinct that we expect to find in human beings, necessarily the jury would be permitted to find from the fact that the father had told him to stay away from there that the child knew it was dangerous to be there, and that therefore his being there was not in the exercise of the care that a child of his age and mental condition would be expected to exercise, so I think that the question is proper and it may be asked and answered.

(Answer repeated.)

The Court—What did he tell you, Eddie?

The Witness—He didn't tell me nothing.

Q. 81. What were you going to say when you were stopped a moment ago, something about what your father told you?

A. He didn't tell me about the railroad, he forgot that, he only told me about the trolley cars on Passaic Street and horses and wagons on the street.

Q. 82. He told you to look out for the trolley cars?

A. And automobiles and motorcycles and bicycles.

Q. 83. And he didn't tell you to look out for railroad cars, is that right? A. Yes, sir.

Q. 84. You had seen railroad cars going by on the railroad tracks, right there, hadn't you? A. No.

Q. 85. Didn't you ever see railroad trains go by the station? A. Sometimes when they go fast, when they are working, but I didn't see them working when I was there.

Q. 86. Had you seen cars moving back and forth on this side track? A. No.

Q. 87. Did you see men working around on the side track unloading the cars, unloading . .ght, or putting freight into the cars? A. No.

Q. 88. But you had seen trains go by the station on the other track, had you? A. Yes.

Q. 89. Is that right? A. Yes.

Q. 90. You knew you would get hurt if you were run over by a train or car, didn't you? A. Yes, ma'am.

The Court—Were these cars standing still when you started to play there?

The Witness—Yes, they were standing right still.

The Court—Did they remain still until the time when the car moved when your leg was run over?

The Witness—Yes.

Q. 91. Did you see a train of freight cars come up on the track next to the side track? A. No.

Q. 92. Just before you were hurt, a little while before? A. No.

Q. 93. You say you didn't? A. Yes.

Q. 94. Didn't see that train come up on the track next to it? A. No, I didn't see it.

Q. 95. Did you hear a train come up? A. No.

Q. 96. Answer up so we can hear you; did you hear a train go by? A. No, ma'am.

Q. 97. You were busy playing with your marbles and weren't paying much attention to the train, were you?

A. No, I was playing with my marbles.

Q. 98. When your marble went under the car how far under did it go? A. Away to the other wheel.

Q. 99. Away over to the other side of the track?

A. Yes.

Q. 100. Did you go around to the other side of the car to get the marble? A. No.

Q. 101. Did you reach in with your hand?

A. First I reached in with my hand, then I reached under with my foot.

Q. 102. You couldn't reach it with your hand, could you?

A. No.

Q. 103. You couldn't reach it with your foot, either?

A. I reached it with my foot, I wanted to get it by the track and the train come back and hit my leg.

Q. 104. How many times did you reach under with your foot before the train came back? A. Two times.

Q. 105. You reached back, did you; that's right, two times? A. Yes, two times.

Q. 106. And when you reached under the first time the marble was over by the rail farthest away, wasn't it?

A. Yes.

Q. 107. How far under the car did you have to go to reach the marble? A. Way over on the other side.

Q. 108. Had to go all the way under the car?

A. No, I wasn't under the car.

Q. 109. How could you reach the marble on the other side of the track without going?

A. Well, I was up to here, I put my foot way under, then it was right in the middle and I had my foot under only up to here, and then the car come back and ran it up to here.

Q. 110. All right, but when you reached under the first time the marble was way over on the other side of the track? A. Yes.

Q. 111. Now, to reach that marble with your leg you had to get all the way under the car, didn't you? A. Yes.

Q. 112. That's right, isn't it? A. Yes, sir.

Q. 113. Then you caught it with your toe or heel?

A. No, I caught it right here.

Q. 114. With your foot or instep? A. Yes.

Q. 115. Near the ankle, that was the first time, and you give it a kick, did you, or pull?

A. I pulled it again and then it was a little further, and I pulled it again my foot was only up to there and then the car come.

Q. 116. Now, when you reached under the first time you told us you had to get all the way under in order to reach the marble at the far side? A. Yes, ma'am.

Q. 117. And you caught it in your foot as you have shown us? A. Yes.

Q. 118. How soon after that did you get it the second time, right away?

A. I didn't get it right away, it was right in the middle, and then I had to reach again.

Q. 119. Well, did you wait, or what did you do, how long did you stay under the car before you tried to get it a second time?

A. I just went like that, I was way under the car and I quick got out.

Q. 120. You did it the second time right after the first time? A. Yes.

Q. 121. So when you did it the second time you were still under the train?

A. No, it was right in the middle and my foot was right up to here, then it come up to here, that was a little further and I was scared to reach my hand, I might get my hand.

Q. 122. Why were you scared to reach your hand?

A. It is harder for me when I get my hand off.

Q. 123. Why weren't you scared you might get your foot off, that would be worse than getting your hand off, wouldn't it? A. Yes, ma'am.

Q. 124. Well, why were you scared about your hand and not about your foot?

A. Well, I might, you know, when I go to work, when I grow big then I will have a stiff hand and then I won't be able to work.

Q. 125. Were you afraid your hand would get run over?

A. Yes.

Q. 126. What made you afraid that your hand would get run over? A. I don't know.

Q. 127. You were afraid the car might move and run over it, weren't you? A. Yes, sir.

Q. 128. That's right, isn't it? A. (Nods yes.)

Q. 129. And you thought you would rather have your foot run over than your hand, is that it? A. Yes, sir.

Q. 130. Well, why did you think your hand might be run over? A. I don't know.

Mr. Greenstone—If your Honor please, he has already answered the question twice.

The Court—I think I will let him answer that.

Q. 131. Why did you think your hand might be run over? A. I don't know.

Q. 132. What? A. I don't know.

Q. 133. Why didn't you crawl under the car and reach it with your hand, reach this marble with your hand instead of with your foot?

A. I might get all smashed to pieces, that's what I thought.

Q. 134. You were afraid you might get all smashed to pieces if you went under the car? Well, you were under the car, weren't you, when you first went under to reach with your foot? A. Yes, ma'am.

Q. 135. Weren't you afraid you would get all smashed to pieces when you went under the car at first?

A. No, that was the second time, then I got afraid.

Q. 136. You got afraid the second time but you weren't afraid the first time, is that it? A. Yes, ma'am.

Q. 137. Why were you afraid the second time and not the first time?

A. Because I thought the train was going to move right away then.

Q. 138. You thought the train was going to move right away? A. Yes.

Q. 139. And that's why you just stuck your foot under the second time instead of reaching way under the way you did the first time? A. Yes, sir.

By the COURT.

Q. 140. What made you think, Eddie, the train was going to move right away?

A. All the cars, Mr. Murphy took with his truck and some other truck came and took some of it out the other cars.

Q. 141. That's while you were there?

A. Yes. Then they had to get some other cars and I was afraid of getting all smashed to pieces because I thought they was going to move right away to get the cars that's full in.

Q. 142. You thought the train was going to move right away?

A. Yes, and get the other full cars instead of the empty cars.

Q. 143. And what made you think that the train was going to move right away?

A. To get the empty cars away and get the full cars there.

Q. 144. Did you see any engine there? A. No.

Q. 145. Well, how did you think the train was going to move without an engine?

A. Well, I thought they was going to go faster in back of them, I couldn't tell.

Q. 146. You knew that a train couldn't move without an engine, didn't you? A. Yes, ma'am.

Q. 147. And you didn't see any engine there? A. No.

Q. 148. Did you or didn't you see the engine?

A. I didn't see no engine at all.

Q. 149. Then why did you think the train was going to move? A. I don't know.

Q. 150. When you put your foot under the train were you afraid that your foot would get hurt? A. No.

Q. 151. Why weren't you afraid your foot would get hurt when you put it under the train?

A. Because I can pull it out quicker.

By Mr. HOBART.

Q. 152. How tall are you, Eddie; do you know? May I ask the witness to stand up a moment, I would like to see how tall he is.

(The witness upon being measured proves to be 47 inches tall.)

Q. 153. How much taller are you now than you were when you got hurt, do you know?

The Court—I think you had better try to prove that by the father.

Mr. Greenstone—His father says about three inches.

Mr. Hobart—It is agreed that he is three inches taller now than he was at the time of the accident.

RE-DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 154. Are you sure that when you and little Christy were playing together that nobody came near you and warned you away? A. No, nobody came near.

Q. 155. And that you heard no engine make any noise there?

The Court—He has testified several times to that effect.

Mr. Hobart—That reminds me of something else, one other question.

RE-CROSS EXAMINATION, by Mr. HOBART.

Q. 156. How long have you been going to public school?

The Court—He said on my examination, a little while before he was hurt.

Q. 157. Did you start to go to school before you were hurt? A. Yes, ma'am.

Q. 158. And on your way to school did you have to cross these tracks? A. No, we didn't have to cross no tracks.

JACOB BROWN, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION, by Mr. GREENSTONE.

Q. 1. Officer, are you a patrolman in the city of Garfield?

A. Yes, sir.

Q. 2. How long have you been a patrolman there?

A. I have been on the regular department eight years, I have been doing police work in Garfield seventeen years.

Q. 3. During that time have you seen children playing where what is known as the Garfield freight shed switch is? A. I have.

Q. 4. Have you seen them playing while railroad men were near by?

Objected to unless the time is specified.

Q. 5. Before April 5, 1916? A. I have.

Q. 6. And how often about? A. Daily.

CROSS-EXAMINATION, by Mr. BAIN.

Q. 7. You warned children to get away, didn't you, Officer? A. I have warned them.

Q. 8. You saw others warn them away? A. I have not.

Q. 9. But whenever you were there you warned the children away? A. Yes, sir.

Q. 10. And how frequently were you there?

A. Why, when I was on days; when I was detailed on day work at that section of the town, that was two weeks

out of six, and the different other times when I had occasion to pass by there.

Q. 11. How many are there on the police force of Garfield?

A. We have eleven men on the Police Department.

Q. 12. Did you have that many in April, 1916?

A. We had ten men.

Q. 13. Do you recall whether you warned the same children away?

A. Why, I never paid particular attention to whether they were the same children or not, there were a number of children playing around what they call the freight yard, in around that switch.

Q. 14. Every time you saw the children you warned them away? A. Yes.

Q. 15. Do you remember warning this little Hilt boy away?

A. I couldn't say whether he was there or not, there was a bunch of children, I told them to go away.

Q. 16. Were you acting under orders of your department in ordering the children away?

A. Why, no, not necessarily; I was only warning them away, thought that probably they would be hurt. I figured that that was a part of my duty.

Q. 17. There were no express orders to you from your chief or other departmental officer to warn the children away from that particular place? A. No, there was not.

Q. 18. That's all.

Plaintiff rests.

FREDERICK D. PANGBORN, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. What is your business?

A. Commercial photographer.

Q. 2. How long have you been engaged in that business?

A. For twelve years.

Q. 2. How long have you been engaged in that business? those photographs were taken? A. Why, No. 5877—

The Court—Just a minute, he just generally asked you.

The Witness—Garfield, N. J.

The Court—In the vicinity of the freight station?

The Witness—Yes, sir; right close by.

Q. 4. That is the locality shown upon the map which is on the rack? A. Yes.

Q. 5. I hand you one of the photographs, will you kindly state where the camera was placed when that photograph was taken?

A. Yes, sir; that was placed over the west rail of the eastbound track.

The Court—Wait a minute, which is the eastbound track?

The Witness—The eastbound track is the middle track on that map.

The Court—Over the west rail of the eastbound track?

The Witness—Yes, and 190 feet south from the north end of the siding, 190 feet to the right on that map.

The Court—Looking towards the freight station?

The Witness—Looking south to engine and cars backing north.

The Court—Well, would it be looking from the freight station?

The Witness—Looking from the freight station.

The Court—The camera would be looking away from the freight station?

The Witness—Yes, sir.

The Court—Now, this picture you have in your hand, when was that taken?

The Witness—August 3, 1916.

Mr. Greenstone—The only objection to it is that it doesn't show the locality where this boy was hurt.

The Court—He says it does.

Mr. Bain—Except the inside track, the main line, we contend nothing about the main line.

Mr. Greenstone—It is just generally showing the condition, if Mr. Bain will state that conditions have not changed there.

Mr. Bain—I will prove that by another witness, they have not changed.

Mr. Greenstone—Well, if you make the statement that will be sufficient, that is, the physical conditions have not changed.

Mr. Bain—There is no change in the tracks.

The Court—I will take it for general conditions. Where is the siding shown on that picture?

The Witness—The siding is where the car stands.

The Court—This must have been looking towards the freight station then.

The Witness—No, sir; that's looking towards Hobart Avenue.

The Court—That's right, I will receive that, it may be marked Exhibit D 2.

Mr. Greenstone—Your Honor will note my exception that it is not pertaining to the particular locality.

The Court—All right, the witness testifies that it is. I will take the witness' statement rather than the conclusion of Counsel from the witness' statement.

Plaintiff's counsel asks an exception, which is hereby allowed and sealed accordingly.

(Sealed)

The Court—The witness testified that that picture was taken at a point east of the freight station look-

ing towards Hobart Avenue and the freight track, that is to say the switch track is the one where the cars are shown standing on.

Q. 6. I show you another photograph and ask you from what point that photograph was taken?

A. Photograph 5898 was taken 75 feet west from the near rail of the siding and 130 feet south of the north end of switch looking east to opening between cars.

Q. 7. On what date was that photograph taken?

A. On August 9, 1916.

Q. 8. And by siding you refer to the siding shown upon the map? A. Yes, sir.

Q. 9. Before you on the rack? A. Yes, sir.

The Court—This picture was taken from a point out in Bogart Avenue?

The Witness—The nearest street to the tracks.

The Court—Yes, Bogart Avenue, looking directly towards the track in a northeasterly direction?

The Witness—Yes, that's correct.

The Court—And the camera was pointing at a point apparently east of the freight station?

The Witness—Yes, sir.

The Court—The freight station does not appear on this?

The Witness—No, sir; the freight station is to the left, cannot be seen in that picture.

The Court—The picture shows here some ground, looks like a driveway; what is that?

The Witness—That is an entrance for wagons that go up from the street into the park alongside the cars there.

The Court—For the purpose of loading and unloading the cars that are on the siding?

The Witness—Yes, sir.

The Court—Now, those cars, and so forth, shown at the bottom of the picture, is that sort of an open

space between—a piece of open space between Bogart Avenue and the driveway alongside the cars?

The Witness—Yes.

Mr. Bain—I offer that in evidence.

Mr. Greenstone—No objection.

(Phonograph received and marked Exhibit D-3.)

Q. 10. I show you a third photograph and ask you from what point that was taken?

A. 5899 is a photograph taken 300 feet south from the north end of the siding and 15 feet east from the near rail of the westbound track, looking northwest to line of cars and opening between them.

Q. 11. By siding you refer to the siding shown upon the map on the rack? A. Yes.

Q. 12. That is the siding near the freight station?

A. Yes, sir.

The Court—This picture is taken northeast of the freight station?

The Witness—Yes, sir.

The Court—The camera was nearer Hobart Avenue; that is, in the Hobart Avenue direction from that station?

The Witness—Yes, sir.

The Court—Looks down the tracks from the freight station?

The Witness—It does.

The Court—Does the freight station appear on it?

The Witness—Yes, sir.

The Court—Which is the freight station?

The Witness—This box car, which is used as a freight station; it is the station at the extreme right of the photograph.

The Court—This little car here, the one that I have marked X there?

The Witness—That's right.

The Court—That's the freight station?
The Witness—Yes.

By the COURT.

Q. 13. Where the cars are shown, is that what is spoken of in the case as the siding? A. Yes, sir.

Q. 14. The first rail on the photograph is the westbound track, the second track is the eastbound track?

A. Yes, sir.

Q. 15. On what date was that photograph taken?

A. August 9, 1916.

Mr. Bain—I offer that in evidence.

Mr. Greenstone—I object to that for the very same reason that it is on the opposite side of the place where this accident occurred and closes out the particular locality where this accident occurred.

The Court—I will receive it.

Plaintiff's counsel asks a nexception, which is hereby allowed and sealed accordingly.

(Sealed.)

(Photograph received and marked Exhibit D-4.)

By Mr. BAIN.

Q. 16. I show you a fourth photograph and ask you from what point that photograph was taken.

The Court—Before you answer that, that, gentlemen of the jury, the witness testified as taken at a point up the track looking down towards the freight station, the little building marked with a cross where the line runs down to it. It is the freight station, and the track where the cars are standing is the siding.

A. This photograph 5900 was taken the 15th of August from the near rail of the siding and 20 feet south from the north end thereof looking south to pointing between cars

and string of cars south of opening, showing train hands in position as engine was said to be backing at the time of the accident.

Mr. Greenstone—I object to that.

Q. 17. What date was that taken? A. August 9, 1916.

Mr. Greenstone—I object to that part of the statement made by the photographer, "as it was said to be at the time of the accident."

The Witness—As it was said to be backing at the time of the accident.

The Court—I will sustain that; strike that out.

By the COURT.

Q. 18. This shows a view looking northeasterly?

A. The photograph here was looking in a direction away from the freight station, looking south away from the freight station.

Q. 19. Looking southeast? A. Looking southeast.

Q. 20. And shows the driveway leading up from Bogart Avenue, the siding across on the siding and through the opening you see the two main tracks.

A. East and westbound tracks.

Q. 21. And the little bit of grass shown at the right-hand side of the picture, is that what has been referred to as the open space between the driveway alongside of the freight tracks and Bogart Avenue? A. Yes, sir; that's correct.

Q. 22. The picture looks towards Hobart Avenue?

A. Yes, sir.

Mr. Bain—I offer that.

(Received and marked Exhibit D-5.)

DAVID R. CROUNSE, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. Are you a practicing physician of the State of New Jersey? A. I am.

Q. 2. How long have you been practicing?

A. Twenty years.

Q. 3. Of what institution are you a graduate?

A. Columbia University, Physicians and Surgeons, New York.

Q. 4. Where do you practice?

A. Passaic, New Jersey, and vicinity.

Q. 5. Connected with any hospital? A. Yes, sir.

Q. 6. What hospital? A. St. Mary's, Passaic.

Q. 7. How long have you been connected with that hospital? A. Oh, fifteen years.

Q. 8. What is your position in the hospital?

A. One of the visiting surgeons.

Q. 9. Did you treat Edwin Hilt, Jr., the plaintiff in this case? A. I did.

Q. 10. When? A. April 5, 1916.

Q. 11. For what?

A. For a traumatic injury to the right or left foot. Traumatic injury of one of his feet and legs.

Q. 12. What did your treatment consist of?

A. An amputation.

Q. 13. Where? A. Above the knee.

Q. 14. At the hospital? A. At the hospital.

Q. 15. How far above the knee?

A. As low down as I could possibly save it.

Q. 16. About how far was that above the knee, can you tell?

A. Must have been about five inches above the knee.

Q. 17. Did the boy have any other injuries?

A. Not that I recollect just now, I don't think so.

Q. 18. How long was he in the hospital?

A. That I cannot tell you.

Q. 19. Was he discharged from the hospital?

A. He was discharged from the hospital.

Q. 20. By you or by your orders?

A. I think his father took him away before he was thoroughly healed up.

Mr. Greenstone—I object to anything that the doctor says unless he knows of his own knowledge.

The Court—Do you know whether his father took him away before he was thoroughly healed up?

The Witness—His father took him away before he was healed up.

Q. 21. What was the condition of the leg when his father took him away? A. About healed up, not quite.

Q. 22. Is there any reason why the boy cannot use an artificial limb? A. He cannot use an artificial limb now.

Q. 23. Will he be able to use an artificial imb?

A. When he grows up.

By the COURT.

Q. 24. Why couldn't he use it now doctor, because the muscles are not strong enough?

A. No, not that, but they don't adjust them to a child at that age, it isn't practical, they wait until they get to be at least sixteen or seventeen years of age; of course they outgrow it.

Q. 25. Oh, yes, it would have to be changed all the time.

A. It would have to be changed all the time on account of the rapid growth.

By Mr. BAIN.

Q. 26. Any physical reason why he cannot wear an artificial limb? A. Not at all.

Q. 27. Merely a question of cost, of changing it from time to time? A. Changing from time to time.

Q. 28. Do you know what an artificial limb costs?

A. $100.

Q. 29. $100? A. Yes, sir.

Q. 30. The price is particularly high now on account of—

A. No, I don't know whether—that's the last one that I have any information about, they may have gone up since then like everything else has.

Q. 31. That's all.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 32. Doctor, was there an amputation before you treated this boy? A. There was a traumatic amputation.

The Court—You mean by that, that the—

The Witness—Train had run over—

The Court—The part had been cut off?

The Witness—Cut off already.

Q. 33. Where was that?

A. I don't know where it happened.

Q. 34. I mean where was this traumatic amputation of the foot? A. About half way up the leg.

Q. 35. How far up? A. About half way.

The Court—Between the ankle and the knee?

The Witness—Between the ankle and the knee, about half way.

Q. 36. Did it seem to you as if a surgeon's knife had cut it around? A. No, sir.

Q. 37. Sure about that? A. I am sure about that.

Q. 38. Well, if a train with its heavy weight strikes a leg with force could it cut through as clean, pretty near as clean as a knife would?

A. It would be a different cut, it mangles it more.

Q. 39. This was torn, was it? A. Mangled, crushed.

Q. 40. And did you operate the same day?

A. The same day, yes, sir.

Q. 41. That's all.

JOHN F. KALAHER, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN:

Q. 1. What is your business?

A. Civil engineer and surveyor.

Q. 2. Where is your business located, where is your office? A. Jersey City.

Q. 3. How long have you followed that profession?

A. About twelve years.

Q. 4. Did you make an examination and survey of the location surrounding the freight house and siding of the Erie Railroad Company in Garfield? A. I did.

Q. 5. When? A. June 3, 1916.

Q. 6. How did you make your survey?

A. Why I surveyed the tracks and property lines, buildings that were in the vicinity of the Erie Railroad right of way between Passaic St. and Hobart Place.

Q. 7. After making your survey, did you make a map?

A. I did.

Q. 8. I show you a map and ask you whether that is the map you made? A. That is the map.

Q. 9. Are the lines on Passaic St., Bogart Ave. and Hobart Place and Spencer Place correctly shown on the map?

A. They are.

Recess.

AFTERNOON SESSION.

MR. KALAHER, resumed.

DIRECT EXAMINATION (continued), by Mr. BAIN.

Q. 10. Are the tracks of the Erie Railroad Company correctly shown on the map? A. Yes, sir.

Q. 11. Does the map also correctly show the position of the buildings in the vicinity? A. It does.

Q. 12. Including the freight house? A. Yes, sir.

Mr. Bain—I offer this map in evidence.

The Court—Any objection, Mr. Greenstone ?

Mr. Greenstone—I might examine him on it.

CROSS-EXAMINATION as to map:

By Mr. GREENSTONE.

Q. 13. You say it shows the buildings in the vicinity?

A. Yes.

Q. 14. Does it show all the buildings in the vicinity as the map appears there? A. Yes, sir, I believe so.

Q. 15. Now you made this survey yourself, did you?

A. I did, yes.

Q. 16. When you went down on Bogart Ave. was that all the houses you could find there. A. Yes, sir.

Q. 17. Sure about that?

A. Yes, sir, on that side of the street.

Q. 18. Up to Hobart Place? A. Yes, sir.

10 Q. 19. All you could find was three houses? A. That's all I seen there.

Q. 20. And any houses on this side?

A. I believe there are, but not close up to the corner.

Q. 21. Well all the way down the block?

A. I think they are, yes, sir.

Q. 22. Are there any houses on this side from Midland Ave. down? A. I think there were.

Q. 23. As a matter of fact don't you know that there are six houses here instead of three?

20 A. They weren't there when I made that map.

Q. 24. When did you make it? A. June 3, 1916.

The Court—Is that map drawn to scale?

The Witness—Yes, sir.

The Court—What is the distance from the northeasterly side of Bogart Ave. over that grass plot to the place that is used as a driveway, that is indicated by a rather faint line on that blue print, isn't it just around your finger up that way, Mr. Bain?

30 Mr. Bain—From the centre of the driveway?

The Court—No, from the northeasterly side of the driveway.

The Witness—Sixty feet.

The Court—Sixty feet, not the northeasterly side

of the driveway, I mean the northeasterly side of Bogart Ave. to the southwesterly side of the driveway.

The Witness—That's about 58 feet if I have got to correct it.

The Court—No, I don't believe you have, what I mean is from here to here (indicating).

The Witness—42 feet.

The Court—How wide is that driveway?

The Witness—An average about 12½ feet.

The Court—What is the surface of the driveway?

The Witness—Why it is sort of filled in ground, cinders and dirt and stuff like that.

The Court—Isn't paved?

The Witness—No.

The Court—How wide is the driveway leading in from Bogart Ave. to the driveway alongside of the tracks?

The Witness—About the biggest part of sixty feet.

The Court—That is the southerly one?

The Witness—That is the southerly one.

The Court—Now how wide is the other?

The Witness—About fifty feet, that's only a rough line there, the driveway.

The Court—There is—

The Witness—There is no definite lines, nothing like that.

The Court—Just the way it has been used to drive in?

The Witness—Yes, sir.

By Mr. GREENSTONE.

Q. 25. Is it practically level with the other adjacent ground?

A. Some parts it is, some parts it goes up in a steep incline.

The Court—Well the driveway that runs along the tracks is above the surface of Bogart Ave.?

The Witness—Yes, sir.

The Court—About how high, do you know?

The Witness—I should say from three and a half to four feet higher than the street line of Bogart Ave.

Mr. Greenstone—That is on a gradual slope?

The Witness—Yes.

Q. 26. And you are still positive that that's all the houses that back up on the railroad on this map, those three houses?

A. That's all I seen there.

(Map marked Exhibit D-1.)

Mr. Greenstone—I object to the offer of the map on the ground that it is not an exact—well we can refute that evidence.

The Court—Well I will overrule your objection, the map may be marked in evidence D-1.

DIRECT EXAMINATION (resumed), by Mr. BAIN.

Q. 27. What is the distance between the centre of each rail of the siding shown on the map?

A. The distance between each rail?

The Court—Not between the centre of each rail, what is the distance between the centre of the south rail and the centre of the north rail?

The Witness—Why thirteen feet centres.

Q. 28. No, you don't understand me, what is the distance between the centre of the south rail of the siding and the centre of the north rail of the siding?

A. Four feet, eight and a half inches.

Q. 29. Is that a standard gauge?

A. That's a standard railroad gauge.

Q. 30. Do you know what the overhang of the average freight car is?

A. Why it varies from about two to two and a half feet.

Q. 31. On each side of the rail?

A. On each side of the rail.

Q. 32. And does that apply to coal cars also?

A. Yes, I think coal cars are about 2 feet five, something like that, I don't know just what they are.

Q. 33. At any rate it is more than two feet?

A. Oh, yes.

Q. 34. What do the initials PP on the map indicate?

A. They indicate telegraph poles.

Q. 35. What is the distance between the centre of the northerly rail of the siding and the centre of the most southerly eastbound rail? A. Eight feet.

Q. 36. How long is the siding? A. About 590 feet.

Q. 37. What is the scale of the map?

A. 20 feet equals one inch.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 38. You have a reference to a siding between the fence and the rail here? A. Yes, sir.

Q. 39. Now, of course, when it gets beyond that fence the siding is much wider, isn't it, when it gets this side beyond this fence the siding is much wider, isn't it, there is nothing to distinguish that from the rest of the ground, is there?

The Court—Now, what do you mean; the siding is much wider, the siding doesn't changes, does it?

The Witness—No, sir.

The Court—The distance between the rails does not change?

The Witness—No, sir.

Mr. Greenstone—I see that was misunderstood; I meant the ground from the track to the fence.

The Witness—Yes, the distance from the end of

the siding is much shorter when it gets up to Hobart Place there.

The Court—What Mr. Greenstone means is the driveway alongside of the siding. How does the width of that compare with the width up where the fence is.

The Witness—Why, the width down at the end of the siding is much wider than it is up near the fence.

The Court—That is because of the spreading out to make a place for the entrances to it?

The Witness—Yes, sir.

Q. 40. Now, as far as these driveways that you have over here is concerned, there isn't very much difference in the grade from the adjacent ground, is there? A. No, sir.

RE-DIRECT EXAMINATION, by Mr. BAIN.

Q. 41. I see marked on the map the word "fence" along the line just south of the southerly rail of the siding; from what point and to what point does that fence extend?

A. Extends from the north side of Hobart Place to a point 320 feet in a southwesterly direction.

Q. 42. Then does the fence bend at a right angle?

A. The fence turns at a right angle in a westerly direction, runs down 70 feet to the north line of Bogart Avenue.

Q. 43. So that the fence runs continuously from Hobart Place to Bogart Avenue? A. Yes, sir.

Q. 44. What kind of a fence is it?

A. I believe it is a wooden fence.

Q. 45. How high, if you remember? A. Oh, I don't know.

Q. 46. A picket fence or a board?

A. Yes, I think it was a board fence.

Q. 47. I show you Exhibit B-3, and ask you whether the fence you have referred to is shown upon that photograph? A. Yes, sir.

Q. 48. The fence shown upon that photograph is the fence you have just mentioned? A. Yes, sir.

Q. 49. That's all.

RE-CROSS EXAMINATION, by Mr. GREENSTONE.

Q. 50. Have you told the distance between the fence and the freight house here, what that would be?

A. About 235 feet.

Q. 51. That's all.

J. W. SCHIESSWOHL, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. What is your occupation?

A. Locomotive engineer.

Q. 2. Employed by what company? A. Erie Railroad.

Q. 3. How long have you held that position?

A. Ten years.

Q. 4. Were you employed by that company as locomotive engineer on April 5, 1916? A. Yes, sir.

Q. 5. What, briefly, were your duties on that day?

A. Well, we have a sort of routine of work around that place and we was covering the same territory as usual.

Q. 6. What place do you refer to? A. Garfield, N. J.

Q. 7. Was your engine engaged in hauling passengers or freight on that day? A. Freight.

Q. 8. Did you operate an engine which pulled a line of freight cars on that day? A. Yes, sir.

Q. 9. Where did you come from or where did you start?

A. Why, we started from what is known as the Island, it is between Passaic and Garfield.

Q. 10. About how many miles above Garfield?

A. One mile, I guess.

Q. 11. And where do you go from the Island?

A. Why, we pull the train, consisting of about 20 cars, empty freight cars, off the island.

Q. 12. Where to?

A. Got on the main track at Garfield, that was about 500 feet west of the station. I had orders at the Island to stop and pick up cars at the switch east of Garfield.

Q. 13. Were you on the east or westbound track?

A. On the eastbound track.

Q. 14. That is, you ran through Garfield on the eastbound track? A. Yes, sir.

Q. 15. And you were going in which direction, east or west? A. We were going east.

Q. 16. Were you to pick up some freight cars on the siding shown on the map Exhibit D-1? A. Yes, sir.

Q. 17. About what time did you arrive opposite the siding or opposite the freight house in Garfield?

A. Well, around two o'clock, I couldn't say just to the minute, but around two o'clock.

Q. 18. In the afternoon? A. Yes, sir.

Q. 19. Do you remember what kind of a day it was?

A. Why, it was a clear day, as far as I remember.

Q. 20. Did you run along the eastbound track beyond the local siding in Garfield? A. Yes, sir.

Q. 21. At what rate of speed did you run past the siding?

A. About ten miles an hour.

Q. 22. How far did you go beyond the point of the siding? A. About 90 or 100 feet.

By the COURT.

Q. 23. Did you have cars attached to your engine?

A. Yes, sir.

Q. 24. How many? A. Twenty cars, twenty empty cars.

Q. 25. Then you were going to back down to take some empties off the siding, is that right?

A. I understood that, he told me, the baggage master said, switch and pick up five cars.

Q. 26. Off the siding?

A. That was my instruction leaving the Island.

By Mr. BAIN.

Q. 27. Before you started to back in the siding did you stop your engine and train? A. Yes, sir.

Q. 28. And about where was the last car with relation to the point of the siding you stopped, if you know?

A. The last car must have been ninety feet east of the switch point leading into the siding.

Q. 29. Then did you back into the switch? A. Yes, sir.

Q. 30. What rate of speed did you back into the switch?

A. About four miles an hour.

Q. 31. As you backed into this siding from whom did you take your signals?

A. Why, a brakeman; he was on the third car from the end on top of a box car.

Q. 32. Do you know how many cars there were on the siding?

A. Yes, I did know; I don't know just exactly, but there was about nine or ten, I should think, because there was five at the head end I had to get; I noticed that as I went up, where they were located.

Q. 33. Were there any openings between the cars on the sidings as you went up? A. Yes.

Q. 34. How many openings?

A. One opening, if I remember right.

Q. 35. Was your bell ringing as you went along the east-bound track past the siding? A. Yes, sir.

Q. 36. The bell on the locomotive. After you stopped beyond the siding did you get a signal to back your train?

A. Yes, sir.

Q. 37. And who did you get that signal from again?

A. The man above, a brakeman by the name of Conkling.

Q. 38. Do you know where Mr. Conkling is now?

A. As far as I know, he has enlisted.

Q. 39. In the United States Army? A. Yes, sir.

Q. 40. Well, when you got the signal did you back your train? A. Yes, sir.

Q. 41. And do you know whether your train made connections with the cars on the siding?

A. Well, that I cannot say; I obey signals; they must have made connections because no more than I backed up once and got the signal to stop a moment or two afterwards I got a signal to go ahead, so the coupling must have been made.

Q. 42. After you first started to back up, what signals did you receive? A. Back-up signal.

Q. 43. That is after you stopped you first got the back-up signal?

A. After I stopped the first signal I received was back up.

Q. 44. That is after you stopped on the eastbound track then you got a signal to back up? A. Yes, sir.

Q. 45. After you got that signal did you get any other signal? A. Got a stop signal.

Q. 46. How long was that after you started to back?

A. Oh, about two or three minutes, I guess.

Q. 47. How quickly did you stop after you got that stop signal?

A. Well, at the rate of speed I was going I could have stopped in about 25 feet, 20 feet or less than that, at that rate of speed.

The Court—Are you talking now about the stop signal after he started to back up?

Mr. Bain—Yes; I am asking him how long after he got that stop signal before his train came to a standstill; how long do you say that was?

A. Two minutes from the time I started to back up until I received this stop signal.

Q. 48. How quickly did you stop after you received the stop signal? A. In time, how quick?

Q. 49. No, within distance, your train traveled after you got the stop signal? A. About twenty feet, I guess.

Q. 50. Did you stop as quickly as you could after you got a stop signal? A. Yes, sir.

Q. 51. That's all.

The Court—Then the train backed about twenty feet?

The Witness—From the time I got the signal to stop it took me about twenty feet to stop.

The Court—The train backed about twenty feet before you got it to a full stop?

The Witness—Yes, sir.

Q. 52. Just one question: As you backed up were you on the right-hand side of the cab of the locomotive or left-hand side? A. Right-hand side.

Q. 53. Could you see along the line of the cars on the side from where you sat?

A. I could just about see the switch point, but I couldn't see the end of the switch.

Q. 54. Couldn't see along the siding? A. No, sir.

The Court—You hadn't been coming down on the siding at all?

The Witness—No, come down the eastbound main next to the siding.

The Court—Yes, but hadn't gotten enough cars between it and the cars you were going to back up on the siding to keep the engine on the eastbound track all the time?

The Witness—Exactly.

Q. 55. Was your engine on the eastbound track when you stopped? A. Yes, sir.

Q. 56. That is when you stopped after starting to back up and after receiving the stop signal your engine was still on the eastbound track?

A. Still on the eastbound track.

Q. 57. And how many cars were there on the eastbound track behind your engine?

A. Must have been about ten or twelve I believe.

Q. 58. Where were the rest of the cars?

A. In the siding.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 59. How long a train do you think it was in feet altogether after you got into the siding?

A. I didn't understand.

Q. 60. About how many feet would that be, that train that you had there, cars and engine after you got into the siding? A. How long?

Q. 61. How many cars did you have there?

A. We had twenty cars on the engine.

Q. 62. And I understand you were going to back up some more?

A. We were to pick up five out of this siding.

Q. 63. That would make twenty-five cars and you say there were nine or ten cars all told on the siding?

A. Well it was about nine cars on the siding without our train backing in.

Q. 64. Yes, so that in all there would be a length say of about twenty-nine cars, is that right, twenty-nine or thirty? A. About that.

Q. 65. Now what is the average length of a car?

A. Forty feet.

Q. 66. That would make about 1,200 feet, a train 1,200 feet long, is that right, that is outside the engine and tender?* A. Yes.

Q. 67. When you say you could see the point of the switch on this map, where would that be about? There is Hobart Place, could you see that?

A. Yes, sir, east of Hobart Place.

Q. 68. You could not see beyond Hobart Place, could you? A. The switchpoint is east of Hobart Place.

Q. 69. Right here, isn't it? A. No, down over the opposite way.

Q. 70. Right here (indicating) ?

A. Yes, sir, that's known as the "Y switch point" and the one further on yet is connected up with the main, that is the main switch point.

Q. 71. So that you were lying right on this crossover, is that right?

A. The cars and the engine was beyond that towards the east.

Q. 72. It was further ahead?

A. The engine was further ahead.

Q. 73. In all there was a distance of approximately say 1200 feet from this end car to where you were, is that right? A. Yes, sir.

Q. 74. Over 1200 feet. What is the length of a locomotive and tender, forty or fifty feet?

A. About fifty feet.

Q. 75. And where do you say your brakeman was who gave you signals?

A. About the second or third car from the back of the engine.

Q. 76. Which side of the car was he on, right or left?

A. He was the centre of the car.

Q. 77. Stood up on top?

The Court—He stood up on top of the car and waved his hand?

The Wtiness—Gave me the back-up signal.

Q. 78. How many were in the crew?

A. Three brakemen and the conductor, well one brakeman is considered a flagman, two brakemen, a flagman, a conductor, a fireman and myself.

Q. 79. Now when you were hauling this line of cars in there, hauling your train in o nthis crossover, how many men of the crew were with you on the train?

A. They was all with me with the exception of the flagman.

Q. 80. Could you see where he was from where you were? A. No, I can not see him.

RE-DIRECT EXAMINATION, by Mr. BAIN.

Q. 81. After you first started to back up how long was it before you stopped your train in distance?

A. Two minutes.

Q. 82. That is two minutes in time, but how far did your train travel after you first started to back up, and between the time you stopped after getting the stop signal?

A. Well that's pretty hard to say exactly, but I will give you an idea; from the time I started to back up I must have went about 700 or 800 feet.

Q. 83. Before you finally stopped? A. Yes.

Q. 84. What kind of cars were behind your engine?

A. Mixed cars, box cars, coal, bumpers, gondolas.

Q. 85. And they made the usual rumble, did they, as your train moved? A. Yes.

Q. 86. As you came to a stop after proceeding down the eastbound track and beyond the Y did you use your air brakes? A. Yes, sir.

Q. 87. That is you used your air brakes to come to a stop? A. Yes, sir.

Q. 88. Then did you have to release your air before backing? A. Yes.

Q. 89. And what if any kind of noise is made by releasin the air?

A. Well, the usual noise, the air blow out of the exhaust or the retaining valve, a sort of a whistling noise.

Q. 90. And isn't there also a jar of the brake shoes?

A. Yes.

Q. 91. Does that extend through all the cars?

A. Through all the cars that's connected up with the air.

Q. 92. All yours were connected up with the air, I suppose? A. Yes.

Q. 93. So that there was this noise of the loosening of the brake shoes and the hissing of the escaping air before you started to back up? A. Yes.

Q. 94. Tell us once more, Mr. Shiesswohl, how far in distance your train traveled after you got the stop signal and before you stopped?

A. Well, that all depends what sort of application you make of the air.

Q. 95. No, no; I mean this particular time.

A. This particular time?

Q. 96. That is after you got the stop signal and before you stopped I think you said it was about twenty feet.

A. That was backing up.

Q. 97. Yes. A. Oh, yes.

Q. 98. That's all.

RE-CROSS EXAMINATION, by Mr. GREENSTONE.

Q. 99. Now, Mr. Shiesswohl, you don't know whether all of those cars had the air apparatus in good order, do you?

A. Well, I don't know how many was connected up that day.

Q. 100. Those cars that were on the siding, you don't know anything about their condition as to air brakes?

A. Well, they wasn't connected with the air yet, because we wasn't on to them yet.

Q. 101. Oh, I see, you were to couple up to them?

A. No.

Q. 102. You were to couple up to some of them, weren't you?

A. Couple up with those on the main track, and we were backing in the side switch, switch track, to couple up.

Q. 103. To couple up to some on the siding?

A. Yes, sir.

Q. 104. Now, as to those cars on the main track, you

don't know anything about whether or not the air brakes was working good on those cars, do you?

A. Well, I didn't have a chance to try them out only this one stop, and they stopped very good.

Q. 105. Well, you don't know whether the air brake was working on the freight cars, do you, on the rear of your engine, till you gave them a thorough test, you don't know, do you?

A. Well, I had resisting power enough, they were O. K.

Q. 106. Well, isn't there an air man that goes around and tests up the cars; isn't he supposed to do that before you take hold of them and give you the signal?

A. Not on a drilling job, no.

Q. 107. You are not so particular on a drilling job as one going through to some distant point?

A. Well, on a drilling job we are running at slow rate of speed at all times, such as six or eight miles an hour.

Q. 108. You are not so particular, are you?

A. Well, we are not supposed—we are always particular.

Q. 109. You don't mean to tell me that you test the cars in the drilling, each particular car as particularly as you would on a distant through freight ride, would you?

A. Not when you are taking up a car and only have to move it a mile, no.

Q. 110. Now, there was no one else gave you signals but this man?

A. That is the signal I got from the head man.

Q. 111. You acted on this head man's signal, he stood up on top of the car in the centre? A. Yes, sir.

Q. 112. And waved to you and then you acted accordingly? A. Acted accordingly.

Q. 113. Now, when you backed in there, did you throw on your brakes quickly or did you do that gradually?

A. I made a full service application there, gradually heavy, you might almost call that an emergency.

Q. 114. Why did you do that?

A. Well, it is customary to do that.

Q. 115. Is that because it was a short stop?

A. Well, kind of short.

Q. 116. You had to be quite careful on account of a short stop, isn't that so?

A. Well, no, it was sort of a method we have in switching, when we get a signal to stop that means stop and we have to stop.

Q. 117. Yes, but you wouldn't throw on the emergency unless there was a necessity for a quick stop, isn't that so?

A. That all depends.

Q. 118. What do you mean by that?

A. If I get a violent stop signal, the quicker I would stop, but in this case I got a gradual stop signal and I stopped the same as usual, I wouldn't call it emergency. There is a place you can place the brake into to get between an emergency and a service stop.

Q. 119. So it wasn't what you call an emergency stop?

A. No, it wasn't.

Q. 120. You said a minute ago it was.

A. Well, I said you could and you couldn't call it an emergency stop.

Q. 121. You now say it is not an emergency stop that you made there; now which is it, we would like to know, was it an emergency stop or slow stop or a medium stop, which?

A. It was a sort of a medium stop, we will call it that.

Q. 122. Oh, sort of a medium stop, that's all.

RE-DIRECT EXAMINATION, by Mr. BAIN.

Q. 123. Was the crew that was with you on the day of this accident the only crew that did drilling in that vicinity?

A. They did it at that morning about ten o'clock.

Q. 124. Well, was your crew the only drilling crew that worked in that vicinity? A. To my knowledge, yes.

Q. 125. And what time of day did you usually drill the cars in this siding?

A. In the morning around ten o'clock.

Q. 126. Did you drill in and out of that siding more than once a day?

A. No, once a day as a rule, this particular day why we had to go in and back up the empties. We did the drilling in the morning and we had placed the empties at the head end of the switch, so in the afternoon we backed them up as we went on east.

Q. 127. That's all.

RE-CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 128. Now are you the regular man, switching along there? A. No, I am an extra man.

Q. 129. Then you don't know about how many times they switch in there, do you?

A Well I had been on that job five weeks at that time and on and off very often, so I got a pretty good line up on the work.

Q. 130. How many times a day did you switch in there?

A. Once a day as a rule.

Q. 131. What time of day?

A. In the morning about ten o'clock.

Q. 132. And you very seldom switched there in the afternoon, is that so? A. Very seldom.

Q. 133. You worked on that particular switch you say on and off for five weeks, so your experience relates to that time, is that so?

A. Well I have had experience on the same job previous to that.

Q. 134. Yes, that's all your experience amounts to on that job? A. Yes.

JOHN COYLE, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. What is your occupation? A. Fireman.

Q. 2. How long have you been employed as a fireman?

A. Eleven years.

Q. 3. For what company? A. Erie Railroad.

Q. 4. Been employed by the Erie Railroad the last eleven years? A. Yes.

Q. 5. On April 5, 1915, where were you working?

A. I was working at Garfield, New Jersey.

Q. 6. On that day were you firing a locomotive?

A. Yes, sir.

Q. 7. And did the locomotive which you were firing pull a string of freight cars past the switch at Garfield on that day? A. Yes, sir.

Q. 8. Where were you going from?

A. From the Island.

Q. 9. Where is that?

A. Down between Passaic and Garfield Station.

Q. 10. About how far from Garfield Station?

A. About a mile.

Q. 11. And where were you to go to?

A. Go down to the oil switches, down at Saddle River.

Q. 12. Along what track did you run past the freight house in Garfield? A. Eastbound track.

Q. 13. Running east? A. Yes, sir.

Q. 14. Did your train back up some empty freight cars on the siding at Garfield? A. Yes, sir.

Q. 15. About what time was that?

A. About half past one or two o'clock in the afternoon.

Q. 16. How did you back in to back up to the freight cars, did you run along the eastbound track to a point east of the Y leading into the switch? A. Yes, sir.

Q. 17. And then back up into the siding? A. Back up.

Q. 18. How many cars did you have if you remember?

A. Around fifteen or twenty, I ain't sure which.

Q. 19. What kind of cars were they?

A. Box cars and dumps and everything.

Q. 20. By dumps you mean full cars?

A. Full cars, yes, sir.

Q. 21. How far did you run beyond the easterly end of the Y leading into the siding before you backed up?

A. Ran around the switch, as far as I know, that's all I know.

Q. 22. What were you doing? A. I was firing.

Q. 23. Attending to your firing? A. Yes, sir.

Q. 24. And not paying attention to much else?

A. No, sir.

Q. 25. Do you recall backing into the siding?

A. Yes, sir.

Q. 26. How long was it after you stopped upon going beyond the Y and before you started to back up?

A. I guess by the time we stopped and started again it was five minutes.

Q. 27. And after you started to back up did you stop?

A. Yes, sir .

Q. 28. How long after you started to back was it that you stopped?

A. We coupled up with the cars, then we went right down to Saddle River.

Q. 29. After you started to back up, Mr. Coyle, your train stopped, didn't it? A. Yes.

Q. 30. How long had your train travelled after it stopped to back up and before it stopped?

A. I don't know the distance.

Q. 31. How fast did your train back into the siding?

A. Backed in slow, say four or five miles an hour.

Q. 32. How long did your train remain on the siding before it pulled out again?

A. Just a couple of minutes, then we pulled out.

Q. 33. Where were you when you backed into the siding? A. I was on the tank of the engine.

Q. 34. That is between the fire box and the tank?

A. Yes, sir.

Q. 35. Were you actually shovelling coal into the fire box? A. Well I don't know exactly then.

Q. 36. But you were down between—

A. I was down between, yes, sir.

Q. 37. The locomotive fire box and the tank of the engine? A. Yes, sir.

Q. 38. You couldn't see in either direction, either forward or backward? A. (No answer.)

Q. 39. Did your train make the usual noise as it went along the eastbound track and came to a stop?

A. Yes, sir.

Q. 40. Did it make the usual noise of backing up?

A. Yes, sir.

Q. 41. Do you recall whether there was the usual noise of the releasing brakes? A. Yes, sir.

Q. 42. That is before you started to back up?

A. Yes, sir.

Q. 43. When did you first learn that there had been any accident?

A. Down at the Island, down at the oil switches.

Q. 44. That's all.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 45. You don't know very much about this thing, do you? A. No, sir.

Q. 46. And as far as the noise the train made is concerned, you were busy shovelling coal?

A. Well, the train makes the same noise all the time.

Q. 47. You assume that it did, and as far as the noise made in the rear of the train, you don't know anything about that? A. No, sir.

Q. 48. You were up in the engine shovelling coal?

A. Yes, sir.

Q. 49. Tending to business? A. Yes, sir.

Q. 50. Not watching for noise? A. No, not exactly.

Q. 51. That's all.

GEORGE MADIGAN, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. By whom are you employed?

A. By the Erie Railroad Co.

Q. 2. As what? A. As a conductor.

Q. 3. Freight? A. I run freight and I run passenger.

Q. 4. How long have you been employed as conductor by that company? A. As a conductor fifteen years.

Q. 5. On April 5, 1916, were you employed by that company as a conductor?

A. I was employed by that company as a conductor, yes, sir.

Q. 6. And what were you doing on that day?

A. I was running the Garfield drill freight train.

Q. 7. Did you have charge of the crew running that drill?

A. I had charge of the crew that day.

Q. 8. Is that the only crew operating in that vicinity?

A. That was the only crew that worked around there doing local work.

Q. 9. And for how long a time previous was your crew the only crew working in that vicinity?

A. Well, before ever I had charge of them for years they have been working there, the crew.

The Court—Were they the same crew all the time?

The Witness—Oh, no.

Q. 10. Was there only one crew that did drilling in that vicinity? A. Well, sometimes there would be two.

Q. 11. Well, at this particular time?

A. At this particular time there was only one, and ordinarily only one.

Q. 12. And for how long a time previous had there been only one crew drilling in that vicinity?

A. Well, about two or three months.

Q. 13. What time did you usually drill in and out of the sidings near the freight house in Garfield?

A. In the forenoon. Ordinarily around 9:10 up to 11 o'clock.

Q. 14. On April 5, 1916, did you have charge of a crew that drilled some freight cars in and out of the siding?

A. Yes, sir.

Q. 15. Where did your train start from on that day?

A. Jersey City.

Q. 16. Where did it go to? A. To Dundee.

Q. 17. What time did it leave Jersey City?

A. Six o'clock in the morning.

Q. 18. What time did it get to Dundee?

A. About seven.

Q. 19. In the morning? A. Yes, sir.

Q. 20. How long did it stay at Dundee?

A. Oh, about ten or fifteen minutes.

Q. 21. Then what did it do? A. Came back to Garfield.

Q. 22. How far is Dundee from Garfield?

A. About one mile by rail.

Q. 23. What time did you get back to Garfield?

A. Why, about eight o'clock.

Q. 24. In the morning?

A. Half past seven to eight o'clock, yes, sir.

Q. 25. What did you do at Garfield?

A. Tend the switch around all the mills there.

Q. 26. Then where did you go?

A. Then I went back to Dundee.

Q. 27. What time did you leave Dundee again?

A. About 4:15 in the afternoon.

Q. 28. Did you in the morning of April 5, 1916, or about noon arrange any cars at the siding at Garfield?

A. Yes, sir.

Q. 29. What time was that?

A. Well, between half past eleven and half past twelve, I worked there, I was done at half past twelve.

Q. 30. That was noon? A. That was noon.

Q. 31. What cars did you leave placed on the siding at that time?

A. I left four loaded cars on the rear; they was there there to be unloaded by dealers and I left five empty cars in the east end of the switch to take out on my way in gathering up the empties.

The Court—That was what time?

The Witness—Half past twelve.

Q. 32. How were the cars placed, that is were there four cars at the extreme westerly end of the switch and then a track and then five cars, or how were they arranged?

A. There was two cars about thirty feet from the westerly end of the switch.

Q. 33. What kind of cars were they? A. Two box cars.

Q. 34. Yes, then what came next after that?

A. Then there was a space of about 15 feet and then there was two coal cars and then there was about twelve or fourteen feet more and then there was five empty cars which we had arranged to pick up.

Q. 35. And that was about where you left the cars on the noon of that day? A. That was the way I left them.

Q. 36. Then you took your train up to Dundee?

A. Then I continued to work around, yes, and went to Dundee for empties.

Q. 37. What time did you again leave Dundee for Garfield on that day? A. About quarter to two.

Q. 38. And to get to Garfield from Dundee?

A. About two o'clock.

Q. 39. And to go from Dundee to Garfield you ran along the eastbound track?

A. I ran along the eastbound track.

Q. 40. In an easterly direction?

A. In an easterly direction.

Q. 41. How many cars did you have going from Dundee to Garfield? A. Twenty cars.

Q. 42. What kind? A. Box cars and coal cars.

Q. 43. Loaded or empty? A. Empty.

Q. 44. How far did your train run after you came back to Garfield along about two o'clock in the afternoon of that day beyond the point of the Y of the local siding, this freight house in Garfield?

A. Beyond the point of the station switch, I believe you mean.

Q. 45. You call the local siding the station switch?

A. Yes.

Q. 46. Yes.

A. About fifty feet maybe, or sixty, the rear car.

Q. 47. That is, the last car in your train was about fifty feet east of the point of the siding, or the station switch as you call it? A. Yes, sir.

The Court—That is to say where the siding joins to the eastbound track?

The Witness—Yes, sir.

Q. 48. Is that what you call the point of the switch or the siding?

A. That's what we call the switch point, yes, sir.

Q. 49. After you got to that point how long did you stop? A. Oh, I stayed there about five minutes.

Q. 50. Where were you?

A. I was in the middle of the twenty cars up on top of a box car.

Q. 51. And were you in the middle of the twenty cars

and on top of the box car as you ran along the eastbound track and passed the siding? A. Yes, sir.

Q. 52. You stayed right there until you came to a stop?

A. I stayed right there until I came to a stop.

Q. 53. After you came to a stop what did you do?

A. Well, I watched the rear brakeman.

Q. 54. Who was he? A. His name was Pruner.

Q. 55. Did you see him drop off?

A. I saw him drop off at the station switch where the cars was.

Q. 56. About where did he drop off as nearly as you can remember with respect to the openings between the cars on the siding? A. He jumped off by the two coal dumps.

Q. 57. You watched him, did you? A. I watched him.

Q. 58. How long did your train remain standing after it passed east of the Y? A. About five minutes.

Q. 59. Then did you get a signal?

A. Then I got a signal from the rear brakeman to back up.

Q. 60. That was from Mr. Pruner? A. Yes, sir.

Q. 61. Did you then back? A. Then we backed up.

Q. 62. What did you next do?

A. Well, when we got pretty near the cars about time to stop I gave the engineer and the head brakeman the signal to stop.

Q. 63. Did the train then stop? A. The train stopped.

Q. 64. How long after you gave the stop signal was it stopped?

A. Oh, maybe five seconds or ten seconds, about that.

Q. 65. And after you gave the stop signal how far did the train travel about?

A. Oh, maybe about twenty feet, twenty-five feet.

Q. 66. As you were passing the siding—

The Court—Just one moment; you gave the stop signal before the rear end of the rear train that was backing in had come in contact with the five cars?

The Witness—Yes, sir; when we think it is about time to stop so that he will stop about the time he hits the car we give the signal to stop.

The Court—How far would you say that the five cars that were stationary were moved back when the twenty cars hit them?

The Witness—About ten feet.

The Court—They didn't then completely close the gap between that and the next two cars?

The Witness—No, they did not. I don't think they went ten feet. There was quite a space left yet after the accident; they probably went close to ten feet.

The Court—So that they came pretty close together?

The Witness—Yes.

Q. 67. How fast did your train go in backing into the siding? A. Well, between four and five miles an hour.

Q. 68. As she went by the siding you were sitting on the box car? A. I was standing on top of the box car.

Q. 69. Did you see any children on the siding at that time? A. Didn't see no children around the siding.

Q. 70. Have you chased children away from that switch or siding? A. Many times.

Q. 71. Where was Mr. Pruner, your rear brakeman, when you got the signal to back up?

A. He was back towards the empty cars we was to couple on to.

Q. 72. On the north side of the empty cars or south side?

A. On the north side.

Q. 73. Did your train make the usual noise in going up the siding? A. Oh, yes.

Q. 74. And after the train came to a stop before you backed in the siding, was there the usual noise of releasing of brake shoes?

Mr. Greenstone—If your Honor please, I submit I have not objected so far to a lot of leading questions.

The Court—That question is leading; I will overrule it.

Mr. Greenstone—There was a lot of questions on that line.

Q. 75. What can you say with respect to any noise made by releasing brakes after you started to back up?

A. Well, there wasn't very much noise as far as releasing the brakes was concerned.

Q. 76. What noise was there?

A. Well, the cars coming together and the rattle of the cars makes quite a noise, when the engineer would apply his brake it would bring the cars together and make quite a rattle.

Q. 77. After your train backed into the switch or siding did the space between the two cars at the extreme westerly end of the switch and the next car to the east of those cars entirely close up? A. No, sir.

Q. 78. How much of it was left after you stopped backing up? A. Well, probably six to eight feet.

Q. 79. And what was that space originally before you started to back up? A. About 15 or 18 feet.

Q. 80. Was the other space between the two coal cars and the most easterly side cars on the switch closed up after you made your connection?

A. That was closed up, yes.

By the COURT.

Q. 81. Let me understand that; you said there were two cars, two box cars that were at the most westerly end of the switch; then there was two other cars, and there was a space between those two sets of cars of about eight or ten feet as I recollect it, between the box cars and the coal cars, or between the coal cars and the others.

The Witness—Between the coal cars and the others.

The Court—There was a space there of about twenty feet. Now, that space wasn't affected at all when you moved back and made the coupling to the empties?

The Witness—Yes, some.

Q. 82. How was that?

A. Well, the empties came against the coal cars.

Q. 83. You had five cars before you struck?

A. Five empties to couple on; when I coupled on to those five empties they moved back against the coal cars.

Q. 84. Oh, they did? A. Yes.

Q. 85. I misunderstood you; I thought you said before the five empties were not moved back to the coal cars?

A. Oh, yes, it was the coal cars. I understood you to ask me if they moved back against the box cars, the coal cars was moved.

Q. 86. Well, the empties struck the— A. Coal cars.

Q. 87. The twenty empties struck the five? A. Yes, sir.

Q. 88. And that moved the five empties back over the intervening space between that and the coal cars which you say was about 15 feet? A. Yes, sir.

Q. 89. And moved the cars about how many feet?

A. About five or six feet.

Q. 90. I suppose when it struck the coal cars it moved them; that the train necessarily followed them?

A. Why, that slack, you know, in twenty cars there is quite a bit; when the engineer puts his brake on the rear end a little further than the engine, and naturally it would run further. There is probably a foot of slack between two cars.

By Mr BAIN.

Q. 91. As you started to back up to go into the switch, in which direction were you facing? A. West.

Q. 92. And as you ran along the eastbound track before you started to back into the Y, in which direction were you facing? A. West.

Q. 93. So that you faced west all the time, you had your back to the engine all the time? A. Yes.

Q. 94. Did you see Pruner drop off? A. Yes, sir.

Q. 95. He was the rear brakeman? A. Yes, sir.

Q. 96. I thought you said he dropped off opposite the space between the two box cars at the westerly end of the switch and the other cars at the easterly end of the switch, is that right?

A. He dropped off between the five empty cars and the two coal cars, and went through that space which was about 15 feet.

Q. 97. You saw him go through the space? A. Yes.

Q. 98. And where did he next come in your sight?

A. Well, he next came in my sight at the east end of the empty cars.

Q. 99. East end of the empty cars? A. Yes, sir.

Q. 100. That is, Mr. Pruner, who was in back, did not come back through the opening between the two cars north of the switch? A. No.

Q. 101. He remained south of the switch? A. Yes, sir.

Q. 102. The next you saw of him was when he came up the easterly end of the cars and the switch?

A. Yes, sir.

The Court—That is the five empties, the easterly end of the five empties?

The Witness—Yes, sir.

Q. 103. Is that where he was when he gave you the signal to back up?

A. He went on up, opened the switch for us to back in, in that space he was.

Q. 104. Then he went to the switch and opened that to back up? A. Yes, sir.

Q. 105. It was after that time that he gave you the signal to back up? A. Yes, sir.

Q. 106. As you backed up into the switch, did you remain on top of the box car?

A. I remained on top of the box car.

Q. 107. About the middle of the train?

A. About the middle of the train.

Q. 108. You got your signal from Pruner? A. Yes, sir.

Q. 109. Who did you give your signal to?

A. To the head brakeman.

Q. 110. Who was he? A. His name was Conkling.

Q. 111. Where was he standing?

A. Two or three car lengths from the engine.

Q. 112. To whom did he transmit his signal?

A. To the engineer.

Q. 113. You gave a stop signal to Conkling, did you?

A. Yes, sir.

Q. 114. How long after you gave that stop signal was it the train came to a standstill?

A. Oh, maybe half a minute, a little less.

Q. 115. Now, you have said something about the slack in a train of cars extending a ca rlength somewhat after you come to a stop.

A. Well, after he stopped the engine, why the slack of the twenty cars runs out.

Q. 116. What is the slack of twenty cars?

A. Well, I should judge about 15 feet.

Q. 117. That's all. Oh, just one question. I think you said, did you not, that as you came up on the eastbound track, that is as you came back, the switch or siding, you did not see any children, is that right?

A. I did not see any children.

Q. 118. And were you looking at the siding?

A. I was looking at the siding.

Q. 119. That's all.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 120. There were cars standing obstructing your line of vision, weren't there? A. How is that?

Q. 121. As you went up there were cars standing on the switch obstructing your line of vision?

A. No, they wouldn't obstruct my vision any.

Q. 122. Well, weren't there cars that you had to pass before you could see any children on the other side of the cars?

A. Well, I couldn't see through the car and see a child, but I could see the cars around the end when I would be going by.

Q. 123. Yes, around the end. A. Yes, sir.

Q. 124. Now, as you passed those cars you couldn't see whether children were on the other side?

A. Not if they was hiding, no.

Q. 125. Not if they were hiding? A. No.

Q. 126. If they stood right alongside of the car you couldn't see them, could you, even if they weren't hiding?

A. If they stood away from it a couple of feet I could, yes.

Q. 127. Two feet? A. Well, yes.

Q. 128. You could? A. Yes.

Q. 129. Well, you mean to say as you stood up on top of this box car on the main line going down? A. Yes, sir.

Q. 130. And this switch, this siding along here, how far is that from the main line? A. How far is what?

Q. 131. This siding from the main line that you were passing on?

A. It is right alongside the main line.

Q. 132. How far from it in feet? A. About four feet.

Q. 133. I mean from your opposite track here? A. Yes.

Q. 134. That's the easterly track, isn't it? A. Yes.

Q. 135. Now, from this track here, how far is it from there to this track here?

A. From one rail to the other about six feet.

Q. 136. About six feet? A. Yes.

The Court—How long a time was it from the time that Pruner dropped off, that's the flagman, from the time he dropped off and you said went between the five empties and the two coal cars, until the time that he gave you the signal to back about?

The Witness—Oh, maybe about three minutes.

Q. 137. Now, how wide is the ordinary box car that you had there? About eight feet? A. Oh, no.

Q. 138. How wide?

A. About six feet, five feet and a half or six.

Q. 139. I understood the overhang alone is about two feet; now, if there is two feet overhang on either side, what is the width of the track? A. Four feet eight and a half.

Q. 140. Well, wouldn't that make it about eight and a half feet?

A. Well, no; I don't know where you get that understanding from, that a car is two feet wider on each side than what the track is.

Q. 141. Well, one of your witnesses has testified that there was about two feet overhang; you say there is four feet eight inches between the rails? A. Yes.

Q. 142. Wouldn't that make about eight feet eight inches if your other witness was correct?

A. Well, maybe he was; I never measured it.

Q. 143. You never measured the top of that car so as to find out the width of it? A. No.

Q. 144. Now, what is the relative width between the rails of the main line and the siding; is that wider than the width between the rails of another track? A. Yes, it is.

Q. 145. About how much wider? A. Maybe two feet.

Q. 146. That would make it eight feet—say fourteen feet. Now, you were in the middle of the car, were you?

A. On top of the car.

Q. 147. Yes, that would make it about four feet, a little over four feet, is that right? A. Yes.

Q. 148. So it would be about the distance of sixteen feet from the outer edge of the car?

A. Oh, no, it wouldn't be sixteen feet from the middle of one car to the far edge of the other car; no, it is not that far.

Q. 149. Why not; isn't that measurement correct that you just went through?

A. Well, I don't know about the measurement.

Q. 150. We just went through it; let's start it all over again. So this is about six feet? A. Yes.

Q. 151. Now, the width of the car would be about eight feet, is that right? A. Yes.

Q. 152. Now, that would make fourteen feet, two feet overhang that I didn't count?

A. Yes, that's it exactly, there is four feet you weren't counting.

Q. 153. You take off four feet for that? A. Yes, sir.

Q. 154. That would make it about twelve feet, wouldn't it? A. About twelve feet, yes.

Q. 155. And about how tall are you?

A. I lack about an inch and a half of being six feet.

Q. 156. As you stood in the center, six feet high, could you look over the top? Will you kindly step off the witness stand? How high is a car?

A. A car is about twelve feet from the ground.

Q. 157. And about twelve feet away from you? A. Yes.

Q. 158. Could you see an object say ten feet down on the other side, two feet away, with you six feet up on the other car?

A. No, but that ain't what I said; I didn't look over the car to see if there were any children there; I looked along the side of the car to see if there were children there or wagons or teams.

Q. 159. You didn't look over the car at all?

A. Yes, I did.

Q. 160. You said just a moment ago—

A. I didn't look down to see if there was a child on the track, but I could look along the side of those cars before I got to them and see a child two feet away from them.

Q. 161. Did you look over the cars or not, which is it?

A. I did look over them.

Q. 162. Well, you couldn't see if you had looked over them, a child standing along the cars in that position, could you? A. No, sir, could not.

Q. 163. You weren't paying any particular attention to the openings between the cars there, were you?

A. Yes, I was paying strict attention.

Q. 164. You weren't watching your brakeman at all, were you? A. Yes, I was watching the brakeman.

Q. 165. Watching for a signal? A. Yes, sir.

Q. 166. And watching at the same time for children?

A. Watching for children or teams or whatever might be up against that switch, same as I do every day of the year.

Q. 167. You were looking between these openings; where had your brakeman dropped off?

A. At the opening between the six empties and the two coal cars.

The Court—Five empties.

A. The five empties and the two coal cars.

Q. 168. And did you watch him drop off?

A. I watched him drop off.

Q. 169. That's all.

RE-DIRECT EXAMINATION, by Mr. BAIN.

Q. 170. When was the first you knew that there were any children in the vicinity?

A. Well, after we stopped, instead of the brakeman giving me a signal to go ahead I saw him running around the

cars, I waited a few minutes and apparently there was something wrong by the action of the man.

Q. 171. Previous to that had you seen any children at all? A. Hadn't seen no children.

Q. 172. State exactly how you looked to see if there was anybody along the siding?

A. When I was coming along the eastbound track I looked on the right hand side of those cars to see if there was anybody there.

Q. 173. That was before your train got to the cars?

A. Before my train got to the cars, yes, sir.

Q. 174. You looked up ahead to see if there was anybody there? A. Yes, sir.

Q. 175. Then after your train got beyond the cars of the siding had you turned around again and were you facing west?

A. I was facing west after we passed the cars.

Q. 176. And after you passed the cars? A. Yes.

Q. 177. Did you again look along the side of the cars on the siding?

A. Well, I couldn't see very well after I went by the cars because the empties would be in the way of the loadeds.

Q. 178. Of how many men does your crew consist and who were they? A. It consists of a flagman, two brakemen, an engineer, a fireman and conductor.

Q. 179. Just give them by name if you will?

A. The engineer was Shiesswohl.

Q. 180. Who was the fireman, Coyle?

A. Coyle, and the flagman was Devoe and the rear brakeman was Pruner and the front brakeman was Conkling.

Q. 181. That was your entire crew?

A. That was our entire crew.

Q. 182. That's all.

RE-CROSS EXAMINATION, by Mr. GREENSTONE.

Q. 183. When your rear brakeman jumped off did you watch for him until he gave you the signal?

A. I watched for him until he gave me the signal, yes, sir.

Q. 184. That's all.

By the COURT.

Q. 185. How long did it take you from the time that you got the signal to back back, from the time that you got on the siding where you could see alongside of the siding before the train came to a stop or before you got the signal to stop rather? A. How long a time was it?

Q. 186. Yes.

A. About three minutes, maybe not quite that long.

Q. 187. You said it took three minutes from the time Pruner jumped off before you got the signal to get back?

A. Yes. Well, then, it took about two or three minutes, —well about three minutes, say two or three to back up that little distance.

Q. 188. So altogether there was about three minutes from the time that Pruner jumped off until you got—

A. Until we backed again, yes.

By Mr. GREENSTONE.

Q. 189. Now can you point out here just about where Pruner jumped off?

A. Yes, sir, Pruner jumped off about here.

(Witness indicates with a circle).

Q. 190. And how soon did he throw that switch?

A. About three minutes.

Q. 191. He waited for you to make the crossover?

A. He didn't wait for nothing, he just simply come across here, come up to this switch and throwed it.

Q. 192. Why did he stop off here when the switch was up here?

A. For the purpose of not backing up to that switch until he know there was no wagons or people standing there against the cars.

Q. 193. You have made a statement? A. Yes, sir.

Q. 194. To the railroad company? A. Yes.

Q. 195. In that statement that is about what you said? A. Yes, sir.

Q. 196. And as far as you know did Mr. Pruner likewise say that?

Mr. Bain—Objected to unless it appears that the witness knows.

A. Well, as far as I know I don't know tha the didn't.

The Court—You don't know anything about it, do you?

The Witness—No, only him and I have talked it over, we talked it over at the time that the accident happened.

Q. 197. And it took you about three minutes or six minutes in all to start backing it? A. Oh, no, it didn't.

Q. 198. How much did it take?

A. About three, a little over three minutes.

Q. 199. So that after Pruner threw that switch it took you about three minutes to get down, is that it? A. Yes.

Q. 200. So it took him three minutes to go up and three minutes back, that made it six minutes in all? A. Yes.

Q. 201. It was then you knew that this accident occurred?

A. After we had stopped I told you I saw the actions of the men back there.

Q. 202. You didn't watch Pruner where he went or what he did, did you? A. Yes, sir.

Q. 203. You were watching him? A. Yes, sir.

Q. 204. He was walking alongside the siding, why were you watching him?

A. I was watching when he come up to throw the switch to catch me coming back.

Q. 205. But there were all these cars along the siding?
A. Yes.
Q. 206. He was alongside the cars?
A. I didn't see him behind the cars, I watched for him to come from behind the cars.
Q. 207. You were looking up ahead where he would come out from behind the cars, you mean up here, don't you, to throw that switch, were you looking up ahead for him to throw that switch?
A. I was looking all over that territory.
Q. 208. I am asking were you looking for Pruner to come out behind the cars?
A. I didn't care whether he come out behind or not, as long as he throwed it.
Q. 209. Were you looking?
A. I was looking west towards that switch.
Q. 210. In this direction?
A. No, this direction, I was up there and looking west.
Q. 211. Did Pruner come up here to throw that switch?
A. Yes.
Q. 212. And you were watching Pruner? A. No.
Q. 213. To get from behind the cars?
A. No, I wasn't watching him behind the cars.
Q. 214. To get from behind the cars? A. Yes, sir.
Q. 215. He was going in that direction?
A. Yes, sir, he was going east.
Q. 216. Did you watch him when he was at the switch?
A. I watched him when he was at the switch.
Q. 217. That's all.

JACOB DEVOE, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. What is your occupation? A. Conductor.
Q. 2. For what company? A. Erie Railroad Company.

Q. 3. How long have you been employed as conductor for that company? A. Eight years.

Q. 4. Were you working for that company on April 5, 1916? A. Yes, sir.

Q. 5. In what way? A. As a flagman.

Q. 6. With what crew were you working?

A. Dundee crew, they call it the Dundee crew at work at Garfield.

Q. 7. Who did that crew consist of?

A. Conductor Madigan, Engineer Schiesswohl, Fireman Coyle, Brakeman Conkling and Brakeman Pruner.

Q. 8. You were the flagman of the crew? A. Yes, sir.

Q. 9. On that day, then, April 5, 1916, did your train come down the freight siding or switch at Garfield?

A. Yes, sir.

Q. 10. Where did the train come from?

A. From the Dundee Island, as we'll call it, Dundee Station.

Q. 11. Is that east or west of Garfield?

A. West of Garfield.

Q. 12. About how far west of Garfield?

A. In the neighborhood of a mile.

Q. 13. What time did you leave Dundee?

A. Well, I couldn't just exactly say, but between one and two.

Q. 14. In the afternoon? A. In the afternoon.

Q. 15. Along what track did you proceed, eastbound or westbound?

A. Eastbound track, after arriving on the main track at Bergen County.

Q. 16. Were you on the eastbound track when you ran past the siding at Garfield? A. Yes sir.

Q. 17. How many cars did you have about, if you remember? A. In the neighborhood of 20.

Q. 18. What kind of cars?

A. Mixed cars, empties, box, gondolas.

Q. 19. All empty? A. As far as I know, yes.

Q. 20. About what time was it you arrived in Garfield?

A. Why between—

Q. 21. That is at the siding or switch at Garfield?

A. Well very shortly after leaving Dundee Island.

Q. 22. Was that along about two in the afternoon?

A. Yes.

Q. 23. Where were you riding as your train went by the siding at Garfield?

A. Well I wasn't on the train at all then.

Q. 24. You were not on the train?

A. I was out with the flag.

Q. 25. I am speaking now, were you on the train at Dundee?

A. No, sir, I was out on the main track at Dundee when they left Dundee.

Q. 26. How did you get from Dundee down to Garfield?

A. I was at the main track of the "Y", that is the Bergen County main track, that they were coming out of there; there has got to be some one up there to let them out.

Q. 27. Now do you mean by the Bergen—

A. Bergen County is the main track; Dundee they have a spur running off the main track down into Dundee.

Q. 28. Now, you came down from Dundee to Garfield. didn't you? A. The train came from Dundee to Garfield.

The Court—He wants to know whether you came from—

The Witness—I came from the "Y" to Garfield.

The Court—Did you come on the train to Garfield?

The Witness—No, sir; I was stationed out there at Garfield, a short way from Garfield Station.

Q. 29. You stayed at Garfield all that day?

A. Not at that time.

Q. 30. Now, what I am talking about is this: your car worked up at Dundee, didn't it? A. Yes, sir.

Q. 31. Were you with the car at Dundee? A. No, sir.

Q. 32. Where were you when the car was at Dundee?

A. At Garfield.

Q. 33. You were at Garfield? A. Yes, at the "Y".

Q. 34. What time did you get to Garfield that morning?

A. Around 7 o'clock.

Q. 35. Did you stay at Garfield from 7 o'clock until 2 in the afternoon? A. No, sir.

Q. 36. Where did you go from Garfield?

A. Well, we had our work around at different points.

The Court—Where were you at 2 o'clock in the afternoon?

The Witness—At Garfield.

The Court—Whereabouts?

The Witness—Why, the station.

The Court—What station?

The Witness—Garfield station.

The Court—What station?

The Witness—Garfield station.

The Court—Freight station, passenger station or what?

The Witness—Passenger station and freight also.

The Court—They are together, are they?

The Witness—Well, very close, within 100 feet.

Q. 37. Well, as this freight train came to the "Y" of the siding or switch at Garfield, where were you?

A. Why, I was following the train up, walking up toward where they were working at the station switch.

Q. 38. Did you arrive up at the station switch before the train started to back up? A. No, sir.

Q. 39. You got there after the train started to back up? A. Yes, sir.

Q. 40. How long after? A. Why, two or three minutes.

Q. 41. Well, were you stationed on the main track while your train was on the main track? A. Yes, sir.

Q. 42. And what were you stationed there for?

A. Protection for the train.

Q. 43. So that when your train was on the eastbound track just east of the "Y" you were on the eastbound track west of the station, were you? A. Yes, sir.

Q. 44. And for what purpose?

A. Protecting my own train.

Q. 45. So as to flag passenger and freight trains on the eastbound main track? A. Yes.

Q. 46. And that's what you were out to do, protect your trains from other trains coming along the eastbound track?

Mr. Greenstone—Your Honor—

A. Yes, sir.

Mr. Greenstone—I object to what Mr. Bain thinks the witness intended to do.

The Court—Oh, this doesn't hurt anybody.

Q. 47. How far were you west of the freight station at Garfield at the time your train started to back into the siding? A. About 200 feet.

Q. 48. Did you go up as far as the siding before your train started to back? A. No, sir.

Q. 49. Did you at all times stay about 200 feet west of the freight house?

A. Why, I stayed further than that as a rule, but I think that would be—

The Court—Well, now, after the train started to back, where were you?

The Witness—After the train started to back about 200 feet from the switch; they were backing it.

The Court—Were you then between the switch and the freight house?

The Witness—No, I was between the station and the switch.

Q. 50. That is, you were west of the freight house?

A. West of the freight house.

Q. 51. How long after the train started to back did you leave that point and go back to your train?

A. About three minutes.

Q. 52. Well, did you or did you not wait to go back to your train until after your train started to pull out of the "Y"? A. No, sir.

Q. 53. How did you come to go back to your train after it pulled in to the switch?

A. Why, I saw a man walking towards the train that looked to me hurrying towards the train—looked to me as though there was some trouble, so I stepped up a little further where I could look up along the switch, and I seen him pick up a boy.

Q. 54. And how long was that after the train backed into the siding? A. Well, not over two minutes.

The Court—The man that you saw, was that the man sitting in the back of the room?

The Witness—Yes.

The Court—Stand up.

(Mr. Kissler stands up.)

The Court—That man?

The Witness—Yes, sir.

Q. 55. Do you remember how the cars were placed on the siding at that time? A. Yes, sir.

Q. 56. Well, state how they were arranged.

A. Why, first there was two box cars in the rear, then there was a space of about 30 to 35 feet, then two coal cars, and then there was a space, and then four or five other cars that they were going to back up.

Q. 57. After your train backed up was the space between the two box cars and the end of the switch and the next two cars to the east closed up? A. No, sir.

Q. 58. Still open, and, if so, to what extent?

A. There was an opening there probably 15 or 18 feet.

Q. 59. How long after your train started to back up was it that your attention was called to anything being wrong?

A. Well, I couldn't see; my train start to back up.

Q. 60. Well, after your train stopped backing?

A. After it stopped backing up, why it wasn't over two minutes, probably three, before I saw there was something wrong.

Q. 61. And at that time you were west of the freight house on the eastbound main switch, main track? A. Yes.

Mr. Greenstone—If your Honor please—

The Court—Ask the witness where he was.

Q. 62. What did you do then?

The Court—Don't lead the witness, Mr. Bain.

Q. 63. What did you do then?

A. When I surmised there was something wrong I stopped to see if I could look.

Q. 64. Where did you go? A. Towards the train.

Q. 65. On the north side of the train, or the south side of the train? A. On the south side of the train.

Q. 66. What did you see there?

A. Why, I saw that gentleman back there holding the boy.

Q. 67. That's Mr. Kissler? A. Yes, sir.

Q. 68. What did you do?

A. Why, I told him to take him over to the drug store. He said he couldn't; he had his horse there, so he handed him to me and I took him to where medical aid could be given him.

Q. 69. Where did you take him?

A. Back to the station where they could get medical aid for him.

Q. 70. Did you take the boy in the station?

A. Why, I held him there, yes, sir; the doctor was right across the street and I held him while the doctor gave him first aid.

Q. 71. And then what happened the boy?

A. Why, they took him off in the ambulance to some hospital.

Q. 72. Then did you go back to your train? A. Yes, sir.

Q. 73. What happened to your train?

A. Why, they proceeded right on with their usual work.

Q. 74. That's all.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 75. Did you speak to Madigan about this thing at all before he pulled out? A. No, sir.

Q. 76. They went right on after backing up and making the coupling, they went right ahead, is that so?

A. Why, not until they got the signal to go.

Q. 77. Yes, but that signal was given and it didn't take long, they pulled right out, isn't that so?

A. Why, just as soon as they got the signal they pulled right out.

Q. 78. How soon was that?

A. Not over five minutes at the most.

By the COURT.

Q. 79. I understand that you found the boy before the train had started to pull out? A. Yes, sir.

Q. 80. At the time you saw him there had the train come to a stand-still? A. Oh, yes, sir.

Q. 81. Where was Pruner then?

A. Pruner was on the eastbound track right next to where he had made his coupling and probably where the cut was, or very close to that.

Q. 82. What is the cut?

A. He had to make a cut behind those five cars he was to pick up.

Q. 83. What do you mean by that?

A. Why, part the cars from the other.

Q. 84. The five cars had run up against the two coal cars? A. Yes.

Q. 85. Had they made a coupling? A. Yes.

Q. 86. The five had made a coupling with the two coal? A. Yes.

Q. 87. If I understood right they had made a coupling; they were against them there? A. He had to make a cut there.

Q. 88. They had to be cut there.

By Mr. GREENSTONE.

Q. 89. Now, you saw him make that coupling up ahead, did you; you saw Pruner make that coupling, didn't you?

A. Well, I don't know as I did see him make the coupling, no, sir; I can't positively say I did see him make the coupling.

Q. 90. Well, do you remember everything as you do this, relating to this accident? A. What's that question?

Q. 91. Do you remember everything as well as you do this incident, relating to this case, and the facts you have mentioned?

A. I cannot positively say that I saw him make that coupling. I saw him after the train had stopped right away.

Q. 92. You think it was his duty to make that coupling and he was there, is that the idea? A. Yes, sir.

Q. 93. But you don't know whether he was there, do you?

A. I certainly know that he was there, and I saw him there.

Q. 94. Well, did you see him make that coupling then from where you stood?

A. I saw him after the coupling was made, standing there, so that—

Q. 95. How long after the coupling was made did you see him standing there?

A. Why, he was right out there on the main track, right away as soon as I could see—

Q. 96. He was right in your line of vision, wasn't he? He was right ahead of you? A. Why, yes.

Q. 97. Yes, you could see him all the time, couldn't you?

A. Why, if my attention was drawn to him, yes.

Q. 98. What do you mean by that?

A. Why, if I had been looking that way at him.

Q. 99. Weren't you facing that direction?

A. I was walking in that direction, yes.

Q. 100. And he was out on the same track that you were on, isn't that so? A. Yes, sir.

Q. 101. Now, there was nothing to obstruct your vision —you could see him all of the time, couldn't you?

A. Yes, sir.

Q. 102. Now, for about how many minutes did you see him in that line of vision? A. Why, at least—

Q. 103. After he made the coupling?

A. At least a minute and a half.

Q. 104. And after that, what then; where did he go?

A. Why, where he went I don't know. At least I didn't see where he went.

Q. 105. Did he go up towards the switch, do you know?

A. Now, I told you I don't know where he went.

Q. 106. Don't know, well you were looking at him?

A. I can tell you where I went after that.

Q. 107. You are quite sure that he was not on the outside of the siding, but he was on the inside on a direct line of vision with you? Is that so, Mr. DeVoe?

A. I said I don't know what became of him then.

Q. 108. Well, about a minute and a half after the coupling was made you could see him in a direct vision?

A. Yes.

Q. 109. And before the coupling was made how many minutes could you see him ahead of you?

A. Well, I don't recollect seeing him.

Q. 110. Well, approximately?

A. Because from the distance where I was up to the time I saw them backing in, why it was probably four minutes from the time that he disappeared after making the coupling, from the time that they made the coupling.

Q. 111. Do I understand you to say that you saw him four minutes in a direct vision when he made the coupling, and a minute and a half immediately thereafter?

A. From the time they were backing in till he went from my vision or I went—

(Speak louder so I can hear you.)

A. Four minutes from the time they were backing in when they come in my view until I went out of his sight, or he went out of my sight, I must have went so that I couldn't see him.

Q. 112. So you must have went? A. Yes.

Q. 113. Don't you know whether you did?

A. Well, I know I did. If I had stood where I was I could have seen him where he went, but I know—

Q. 114. You are not sure whether you went or he went?

A. I know that I went.

Q. 115. So that he was in the same position there as far as you know? A. As far as I know, yes.

Q. 116. He stood where you had seen him first before he had made the coupling? A. Yes.

Q. 117. Stood right there as far as you know?

A. Well, I don't know if he stood there.

Q. 118. Well, now which is it I want to know the facts; this is a serious case. We would like to know what the facts are.

A. Well, isn't the fact enough that I went away from that spot? Do you want me to swear that he was there longer or shorter than I know anything about?

Q. 119. No, I mean during that four minute period were you both standing inside while the trains were backing up, and you could see him without either of you moving very much? A. That was four minutes, yes.

Q. 120. And how far apart were you during that time?

A. In the neighborhood of 600 feet.

Q. 121. Now, can you come down on the map and just tell the Court and jury whereabouts you stood at that time and whereabouts Mr. Pruner stood at that time?

A. I stood back here the other side of Passaic depot.

Mr. Bain—On the westerly side?

The Witness—On the westerly side. Mr. Pruner was around in this neighborhood here, in here. (Indicates.)

Q. 122. Wasn't he the man that threw the switch?

A. Yes, sir, he was the man that threw the switch.

Q. 123. Well, did you see him go up and throw the switch? A. No, sir.

Q. 124. Now, you saw no other member of the crew on the outside of the switch, did you, towards the street, you saw no one else of the crew there, did you?

A. No, it is too far for me to see that curve.

Q. 125. Well, what I mean is, in that line of vision you saw him there whenever you could see, you were back here, weren't you?

A. I was back there a little further on the other side of Passaic St. where you have your hand.

Q. 126. Could you see some one along the siding?

A. No, I could see no one. That is, there was no one there that I could see.

Q. 127. Well, did you have a clear line of vision from the spot you stood? A. I had a clear line of vision.

The Court—Now could you have seen a child playing on the southerly side of the car?

The Witness—I could not.

The Court—You could not have seen it?

The Witness—No, sir.

Q. 128. So that from where you stood if you had looked on this side of the cars you couldn't possibly see any children there, could you? A. No, sir.

Q. 129. About how many minutes do you think it took after the cars stopped when this man came over to you or you came over to this man that held the child?

A. Well, not over three minutes.

The Court—You say that Pruner at this time was on the other side of the car, on the eastbound track?

The Witness—He was at the time the coupling was made.

The Court—Well, at the time you went to pick up the boy, he was still on the east side?

The Witness—No, he was there when I started, yes, how long he stood there I don't know.

The Court—Yes, but when you picked up the boy he wasn't on the south side of the track?

The Witness—No, he wasn't on the south side of the track.

The Court—How did you communicate with the people on the train, the fact that the boy had been run over?

The Witness—Why Pruner came around and I handed him the flag and told him to go ahead and look out, give them the signal to go ahead and I would look after the wants of the boy.

The Court—How did Pruner happen to come along?

The Witness—I suppose he heard from somebody—

The Court—Well, did you shout, that's what I am getting at.

The Witness—No, I didn't shout.

The Court—How did he come around? What part of the train did he come around?

The Witness—Well, I will tell you I really was a little excited myself—

The Court—If you don't know, say so.
The Witness—I don't know.

RE-DIRECT EXAMINATION by Mr. BAIN.

Q. 130. Where were you when your train ran along the eastbound track and passed the siding.

A. I was walking up on the eastbound from—well it is a point about 7 to 900 feet from the station switch where—

Q. 131. Where did you come from to get on the eastbound track?

A. Well, I am stationed at the eastbound track.

Q. 132. Yes, but where did you come from when you went up to the eastbound track, you weren't standing on the eastbound track all day long, were you?

A. No, I had been working with the train.

Q. 133. Just a moment Mr. DeVoe, you were working with the train? A. I was working with the train.

Q. 134. And your train came down from Dundee?

A. Yes.

Q. 135. Did you come down in the train?

A. No, sir, I was not in Dundee working.

Q. 136. You didn't go to Dundee at all?

A. No, I don't go to Dundee.

Q. 137. You stayed right at Garfield working?

A. From the time they went into Dundee for the empties till they came out.

Q. 138. Now when the freight train came back to Garfield before it got to Garfield, where were you?

A. Stationed about 700 feet from which the switch where this accident happened.

Q. 139. That is west of the switch or east?

A. West of the switch.

Q. 140. Then were you 700 feet west of the switch when the train came along the eastbound track?

A. When they struck the eastbound track and pulled by me there, yes, sir.

Q. 141. That's where you were? A. Yes.

By the COURT.

Q. 142. Now, when you use the expression switch, do you mean the westerly end of the switch track or the place where the switch actually is? A. Where the switch actually is.

Q. 143. It is more than 700 feet from the switch to Passaic Street, isn't it, where the switch actually is?

A. From the rear end of the switch to the "Y", we call it, the "Y".

Q. 144. No, now look at that "Y" there, see the "Y" there.

A. No, that isn't the "Y" we speak of, that isn't no "Y" at all; that's the station switch with an extension. The "Y" is below Somerset Avenue.

Q. 145. Is Somerset Avenue northwest of Passaic Street? A. Yes.

Q. 146. Still further down? A. Yes.

Q. 147. You were 700 feet west of that "Y"?

A. No, I was at that "Y".

Q. 148. Now, how far were you from Passaic Street?

A. About 615 feet from Passaic Street.

Q. 149. West of Passaic Street?

A. West of Passaic Street.

Q. 150. Then after your train went on up east you followed it? A. I followed it.

Q. 151. Yes. Now, when the train started to make the other "Y" there, where Mr. Hobart's hand was a little while ago, to the west of that map, where were you?

A. Why, I was at the station.

Q. 152. Passenger or freight station?

A. Passenger station.

Q. 153. Is that west or east of Passaic Street? A. West.

Q. 154. All right; now did you stay there, or did you keep on moving?

A. I stayed there until I found out there was an accident, about 2 or 3 minutes.

By Mr. BAIN.

Q. 155. Did you see Pruner drop from the train?

A. I don't—no, I don't know as I did.

Q. 156. That's all.

WILLIAM A. DOUGHERTY, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION by Mr. BAIN.

Q. 1. What is your occupation?

A. Freight agent, Passaic.

Q. 2. Employed by what company? A. Erie Railroad.

Q. 3. How long have you held that position?

A. I have been freight agent for about 4 years.

Q. 4. And at what place are you now freight agent?

A. Passaic.

Q. 5. How long have you been freight agent at Passaic?

A. About nine months.

Q. 6. Prior to that where were you agent?

A. Garfield.

Q. 7. How long were you down at Garfield?

A. Why, a little over two years, possibly two years and a half.

Q. 8. Were you passenger agent or freight agent at Garfield, or both?

A. Station agent, passenger agent and freight agent both.

Q. 9. Was there more than one agent at that place?

A. No, sir.

Q. 10. While you were at Garfield where was your office? A. In the passenger station.

Q. 11. How far is the passenger station from the freight house at Garfield?

A. Why, I should think about 100 feet.

Q. 12. 100 feet you say? A. Yes.

The Court—Is the passenger station west of Passaic Street?

The Witness—Yes, sir.

The Court—And the freight station is east of Passaic Street?

The Witness—Yes, sir.

Q. 13. How far west of Passaic Street is the passenger station?

A. Well, it is right on a corner, possibly about 15 or 20 feet.

Q. 14. About 15 or 20 feet from the line of Passaic Street, that is west of Passaic Street?

A. Yes, sir.

Q. 15. And where is the freight house with respect to Passaic Street?

A. Well, that's about possibly 75 feet; it is right on the embankment.

Q. 16. So that the passenger station and the freight house on either side of Passaic Street are directly opposite each other? A. Yes, sir.

The Court—Passaic Street pass under or over the railroad there?

The Witness—Passes under.

The Court—The railroad is elevated?

The Wtiness—Yes, sir.

Q. 17. Are you familiar with the surroundings?

A. Yes, sir.

Q. 18. Of the passenger station and the freight house at Garfield? A. Yes, sir.

Q. 19. And are you familiar or were you familiar with the surroundings as they existed on April 5, 1916?

A. Yes, sir.

Q. 20. Do you recall whether or not there were any freight cars on the siding at Garfield, local freight siding at Garfield on April 5, 1916?

A. Yes, sir, there were.

Q. 21. Do you know whether or not there was an accident at that place on that day? A. I did, yes.

Q. 22. What was the first you heard of the accident?

A. When Flagman Devoe carried in the boy in his arms.

Q. 23. Where did you see the boy first?

A. In the waiting room.

Q. 24. In the station? A. Yes, sir, passenger station.

Q. 25. Who brought him in? A. Flagman Devoe.

Q. 26. What did you do, if anything?

A. Why, I told my head clerk to phone to the police department for the ambulance. They had to telephone over to Passaic, and also for a doctor.

Q. 27. Were you with the boy until he was taken away?

A. Well, I stayed right there until he was taken away. He went to Saint Mary's Hospital.

Q. 28. Before the accident occurred, what can you say with respect to chasing children away from the local freight siding at Garfield?

A. Why, it was a daily occurrence, I always had to chase them away from there, nearly every day, of course,—in fact every day they was playing around there.

Q. 29. Well, who chased them?

A. Why, I did; the train crew whenever they went in the station switch or around that vicinity; the clerks would holler at them.

Q. 30. Did you personally chase the children away from the place? A. Yes, sir.

Q. 31. Who else did you see chasing the children away, actually see?

A. Why, I have often seen the train crew, especially the conductor, the brakeman, whenever we went down there to

do any work, if there was any children around there, we wouldn't allow them to be there.

Q. 32. Do you recall ever seeing the little Hilt boy playing around the siding? A. No, sir.

Q. 33. After the accident how were the cars placed on the siding?

A. Why, they was two box cars next to the bumping block, that's west,—that's nearly up against the freight house, and then there was a space probably 15 or 20 feet, might have been about a car's length, well say about 20 feet; then came a D. & H. coal dump and an Erie dump; there was a space though between the second box car which was a Long Island box car, probably about 15 feet.

Q. 34. That is there was a space between the two cars at the extreme westerly end of the siding and the other cars at the easterly end of the siding, is that croerct?

A. Yes; first came two box cars at the extreme end of the siding, then a space.

The Court—About 15 feet?

The Witness—About 15 feet.

The Court—Then two coal cars?

The Witness—Yes, sir.

The Court—They were together?

The Witness—Yes, sir.

The Court—Then what came?

The Witness—Nothing; that is when I went down there; that was after the acicdent.

Q. 35. What was the space between the box cars and the two coal cars? A. About 15 feet.

Q. 36. That's all.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 37. Now, did Conductor Madigan tell you anything about this about the time of the accident? Did any of that crew tell you anything about this at the time of the accident?

A. Why, I don't know just what you mean; do you mean before or afterward?

Q. 38. At the time of the accident?

A. No, only flagman Devoe.

Q. 39. How soon after did Conductor Madigan speak to you about this accident? A. The next day.

Q. 40. Had you seen him that day after the accident?

A. Not to speak to, no.

Q. 41. Had you seen Pruner that day?

A. No, sir; but I had seen him before the accident, understand, but after the accident they come and had other work, and I never have occasion to talk to them after that.

Q. 42. Now, did Devoe tell you who told him about this thing?

A. Well, yes; he told me that that gentleman sitting over there in the rear gave him the boy.

Q. 43. I see; and that is all Mr. Devoe said he knew about it? A. Yes.

Q. 44. Pruner didn't tell you that he knew anything about the accident the day after?

A. Well, not that I recollect now.

Q. 45. And, as far as you know, Madigan did not know anything about it either, did he? He didn't tell you anything about it the day after?

A. Well, of course, we talked about it.

Q. 46. Yes; did he tell you that he knew anything about it whatsoever? A. Not that I recall now, no, sir.

Q. 47. You heard Madigan say that Pruner was rather excited when he came up to speak to him; did you hear Madigan testify here? A. Yes, sir.

Q. 48. Well, do you remember when he said that Pruner came up to him rather excited and told him something had happened? A. I don't recall that.

Q. 49. Don't you remember?

The Court—What are you trying to do?

Mr. Greenstone—Prove what Madigan said.

The Court—You cannot prove by one witness what another witness testified to in court. The Court and jury are the ones going to decide that, not some spectator.

Q. 50. You say you have chased children frequently from that place?

A. Yes, all around the station, station switch, siding, freight office, freight house.

Q. 51. Where does your work bring you; what section of the station does your work bring you the most part of the day? A. In the passenger station.

Q. 52. There is no special freight agent, is there?

A. Well, the passenger office and freight office is combined.

Q. 53. You act for both passenger and freight?

A. Yes, sir.

Q. 54. So that when you have a freight shipment, why, you leave the passenger station, is that it, go over—well, do you attend at all to the freight shipments?

A. Certainly, but I have clerks to do that; I personally don't go over there.

Q. 55. How many clerks have you? A. Four.

Q. 56. Are they checkers?

A. One is considered a checker.

Q. 57. And you send them out to the freight station, do you? A. Yes, sir.

Q. 58. There is no special man at the freight station there, is there?

A. Well, he is called a checker; he is one of the clerks; he is continually in and around the station switch to deliver freight; that is, to take freight from the cars and from the freight house. He spends more time in around the cars than the freight house.

Q. 59. The only time he usually goes over there is when there is some freight to be shipped or received?

A. Not particularly that it is to go out; the freight—we don't ship very much from there, that is from the siding, the mills do the shipping.

Q. 60. You receive freight, is that right?

A. Well, not very much; not in that siding; shipping is very light.

Q. 61. About how often a day does he get over there for any freight business?

A. Why, the checker is usually there in the morning from about, oh, nine till twelve.

Q. 62. From nine till twelve?

A. Yes, sir; possibly from eight till twelve.

Q. 63. Then there is no one there at the freight station, practically no one there at the freight station?

A. Why, usually the freight station and the cars are—

Q. 64. Left alone?

A. Yes, but understand we deliver freight from the freight yards.

Mr. Bain—Let him answer the question. "You understand we deliver freight." Go ahead; what else do you understand?

A. We deliver freight from the cars and the freight house; the cars are in the siding; people are continually after their freight; it is necessary to keep a man down there by the cars constantly. He is down there as a rule, I say constantly; people don't come after their freight till about nine o'clock. I have to have somebody down there to deliver the freight.

Q. 65. Yes, so that what time of day is that that he is down there constantly?

A. Down there from nine to twelve, and possibly from two to five. The receipt of freight don't amount to anything.

Q. 66. You say you receive freight there almost any time?

A. I didn't say I was receiving freight; instead I said we deliver freight more than we receive it; our receiving end is very, very small.

Q. 67. I see; your shipments, deliveries, are through the truck drivers? A. The shipping is from the mills.

Adjourned to Friday, June 29, 1917, at 9:30 A. M.

FRIDAY, June 29, 1917, 9:30 A. M.

Case continued.

Appearances—Same.

Mr. DOUGHERTY resumed.

RE-DIRECT EXAMINATION, by Mr. BAIN.

Q. 68. At the time Edwin J. Hilt, Jr., was injured, what employes did the Erie Railroad Company have in the station at Garfield?

A. The stenographer, young lady, and Charles Wiser, a clerk by the name of John Sahara and a way bill clerk, Froskin his last name was, I don't recall his first name.

Q. 69. Wiser is in court? A. Yes, sir.

Q. 70. Do you know where Sahara is?

A. Why, he enlisted in the regular army; I couldn't tell you just where he is.

Q. 71. What was the siding shown on the map, Exhibit D 1, used for?

A. For unloading cars, both merchandise and general team track delivery.

Q. 72. How was the merchandise unloaded from the cars?

A. Why, they were usually peddled to the mills by the drill crew, and then later returned to the station switch to be peddled out to the firms by wagon.

Q. 73. How was the freight taken out of the cars while they were on the siding?

A. By the drivers, checked by the clerks.

Q. 74. That's all.

RE-CROSS EXAMINATION, by Mr. GREENSTONE.

Q. 75. You say that you had occasion to chase children away there daily? A. Yes, sir.

Q. 76. Common occurrence to have children around there, wasn't it, daily?

A. Well, not at the particular place, not around the station switch more than around the office. You know the passenger station is probably about—three or four hundred feet.

Q 77. Yesterlay you testified that you had chased children from around this switch point daily? A. I do yet.

Mr. Bain—I object; he didn't say the switch point; he said the siding.

The Witness—The siding.

Q. 78. All right, the siding; the siding where this section of the map is located? A. Yes, sir.

Q. 79. This section on the map.

CHARLES L. WISER, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. What is your occupation, Mr. Wiser?

A. My occupation at present is brakeman.

Q. 2. Employed by what company? A. Erie Railroad.

Q. 3. How long have you been a brakeman for that company? A. I presume about 8 months, 8 or 9 months.

Q. 4. Prior to your becoming a brakeman, were you employed by the company? A. Yes, sir.

Q. 5. In what capacity? A. Chief clerk.

Q. 6. At what place? A. Garfield.

Q. 7. In the Garfield Station? A. Yes, sir.

Q. 8. Which station? A. Garfield.

Q. 9. Yes, but freight or passenger station? A. Both.

Q. 10. You did work at both places, did you?

A. There is only one station.

Q. 11. And what was the nature of your duties while you were working in the station?

A. Everything in general.

Q. 12. What action, if any, did you take when you saw children near the siding shown on the map?

A. Either chase them or run them away.

Q. 13. How often did you do that? A. Very often.

Q. 14. Were you in the station at the time the little Hilt boy was injured? A. Yes, sir.

Q. 15. What was the first knowledge that you had of the accident?

A. Brakeman Devoe came carrying a child over the bridge, Passaic Street.

Q. 16. What did you do then?

A. I telephoned for the ambulance, and in the meantime somebody else must have telephoned, because the ambulance was over there too soon for my call to take effect. In the meantime I had gone outside and I saw Dr. Reed coming out of his house, and I motioned to him to come over.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 17. You say you chased children there daily, likewise, didn't you? A. Yes, sir.

Q. 18. Children played around there as a common occurrence? A. Yes, sir.

Q. 19. Daily? A. Yes, sir.

Q. 20. Children of all ages? A. Yes, sir.

Q. 21. And sizes? A. Yes, sir.

Q. 22. Tots? A. Yes.

Q. 23. 3, 4, 10? A. All ages.

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Q. 24. You say that you would take them and run them away; what do you mean by that?

A. Run them off the property numerous times.

Q. 25. Did they insist upon getting back to the property?

A. A good many times, yes, after my back was turned.

Q. 26. And then very often there was no one there to keep the children away from there? A. Very seldom.

Q. 27. Well, were you there all the time?

A. I wasn't out at the cars all the time. As a rule there was somebody out there though. There was the checker or myself or the agent.

Q. 28. So that as a rule you had someone there all day?

A. Well, there might have been an hour or two or three hours during the day that there was nobody there, wouldn't possibly be anybody there.

Q. 29. All right.

ERNEST HOLMES, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. By whom were you employed on April 5, 1916?

A. Erie Railroad.

Q. 2. As what? A. Section foreman.

Q. 3. How long had you been employed by the company as a section foreman prior to that time?

A. About seven years.

Q. 4. Are you still employed by the company?

A. Yes, sir.

Q. 5. As section foreman? A. Yes, sir.

Q. 6. Are you familiar with the locality shown on this map Exhibit D-1? A. Yes, sir.

Q. 7. How often did you have occasion to be in the vicinity or neighborhood shown on the map?

A. Well, I possibly passed there once a day or twice a day going to work and coming from work.

Q. 8. What action, if any, did you take when you saw children in and around the siding and tracks at the place shown on the map?

A. Why, if I was working around there and there was children, I would chase them away.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 9. Were you in the station at the time that the little Hilt boy was injured? A. No, sir.

Q. 10. And did you see children playing there quite often also? A. Well, yes, I did.

Q. 11. Children of all ages?

A. I didn't notice their ages, I have seen children playing in the lots by the cars.

Q. 12. I say children of all ages? A. Yes, sir.

Q. 13. Children a little smaller than him and his size also? A. Why, I didn't notice.

Q. 14. Well, haven't you seen children about his size playing there? A. Yes, I guess there was.

Q. 15. It was quite a common occurrence to see little children play there, wasn't it?

A. Where do you mean, play around the cars?

Q. 16. It was a common thing to have children play there daily, small children of his size?

Mr. Bain—I object to the form of the question. The question is was it a common thing to have children playing around there daily?

The Court—Well, I suppose that is correct, "for them to play." The Erie didn't have them play, surely.

Q. 17. Was it a common occurrence to see—

The Court—For children to play around there.

Q. 18. Is it a common occurrence for children to play there of about his size, daily?

A. Yes, I have seen children play around cars; when I did, I would chase them away.

Q. 19. And you have seen them when you didn't chase them away too?

A. Did I see them when I didn't chase them away too?

Q. 20. I say you have seen them when you didn't chase them away, haven't you?

A. No; every time I have been working around there and I have seen children around there, I have chased them away.

Q. 21. Yes; you have seen them while you were some distance away from there playing there?

Mr. Bain—I object; if the man was so far away that he couldn't do anything.

The Court—Well, I think he may answer.

A. Yes, sir.

The Court—And when you saw them in those places, did you attempt to get them out of the way, to drive them off?

The Witness—When I was near them I would chase them away.

The Court—When you were near enough to do so?

The Witness—Yes, sir.

Q. 22. And when you were some distance away, why, you wouldn't bother them, would you?

A. Why, I couldn't fix the track and be chasing the children, when I was close to them, why I would chase them away.

Q. 23. When you happened to be right in the neighborhood, why you would chase the children away, is that so?

A. I would.

Q. 24. But if you would see them from some distance you wouldn't bother going over and chasing them, is that right? A. Yes.

RE-DIRECT EXAMINATION, by Mr. BAIN.

Q. 25. What do you mean by answering that sometimes you were some distance away and you wouldn't bother chasing the children away?

A. Well, if I was down, say I was down east of the station, down by Saddle River there, and there was children playing up around the switch, I couldn't chase them away.

Q. 26. How far would you then be from the siding?

A. I should judge a quarter of a mile—half a mile away, I wasn't by the station switch all the time.

Q. 27. That's all.

RE-CROSS EXAMINATION, by Mr. GREENSTONE.

Q. 28. You mean to say that you could see the children from quarter of a mile away playing there?

A. And wouldn't be paying any attention to the children.

Q. 29. Well, what we are talking about is when you were seeing the children.

The Court—What's the use of pursuing this inquiry? You cannot predicate negligence because a section foreman some distance away saw children playing on the track and didn't leave his work and drive them away.

EDWARD M. PRUNER, called and sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION, by Mr. BAIN.

Q. 1. By whom are you employed? A. Erie Railroad.

Q. 2. In what capacity? A. Brakeman.

Q. 3. How long have you been so employed by that company? A. Well, about 3 years.

Q. 4. Do you remember the day the plaintiff, Edwin Hilt, Jr., was hurt? A. Yes, sir.

Q. 5. What were you doing on that day?

A. Acting as rear brakeman.

Q. 6. And who composed the rest of the crew with which you were working on that day?

A. Engineer Schiesswohl, Conductor Madigan, a brakeman named Conkling, myself and Mr. Devoe.

Q. 7. Where were you working on that day?

A. On the Garfield switch.

Q. 8. You also worked some distance east and west of the siding at Garfield? A. Yes, sir.

Q. 9. How far west of the siding did you work?

10 A. Well, that all depends. D.Q. tower.

Q. 10. About how far is that in distance west of Garfield, as nearly as you can tell?

A. Oh, I guess that would be about—35 or 40 car lengths, I guess.

Q. 11. Did your crew place some cars on the siding at Garfield, the siding shown on the map on the day the little Hilt boy was hurt? A. Yes, sir.

Q. 12. What time of day did you place the cars?

A. About 2 o'clock.

20 Q. 13. Before you got to the siding at Garfield, at that time, where had you been?

A. I was on the third hind car.

Q. 14. No, no; where had your train been?

A. On the eastbound track.

Q. 15. From what place did the train come to get to Garfield at that time? A. From Dundee Island.

Q. 16. And in going from Dundee Island to the siding at Garfield, along which main track did you run?

A. Eastbound.

30 Q. 17. Running east or west? A. Running east.

Q. 18. As you came along the eastbound track, and before you reached the siding at Garfield, that is the siding shown on the map, where were you riding?

A. On the third hind car.

Q. 19. How many cars were there on your train?

A. Twenty.

Q. 20. What kind of cars?

A. Mixed cars, box cars and dumps.

Q. 21. Empty or loaded? A. Empty.

Q. 22. As you came along by the siding at Garfield, that is the siding shown on the map, what did you do?

A. Dropped off.

Q. 23. Where did you drop off?

A. I dropped off between the five cars in the switch and the two dumps.

The Court—That's the two coal cars?

The Witness—The two coal cars.

Q. 24. Do you recall how the cars were placed?

A. Yes, sir.

Q. 25. As you came along there? A. Yes, sir.

Q. 26. How were they placed on the siding?

A. The rear of the switch, that is the west end, two box cars, there was a space, I should judge from 20 to 25 feet between the two box cars and the dump.

Q. 27. By dump you mean coal cars?

A. Coal cars, yes; also there was a space between the coal cars and the five cars.

The Court—Five empties.

The Witness—Five empties.

Q. 28. How many coal cars were there? A. Two.

Q. 29. What was the space between the five cars at the easterly end of the siding and the coal cars?

A. To the best of my judgment 15 feet.

Q. 30. Where was it you said you got off the train?

A. Right opposite that space.

Q. 31. Which space again?

A. Between the two dumps and five empties.

Q. 32. That is between the two coal cars and the five cars at the extreme easterly end of the siding?

A. Yes, sir.

Q. 33. And on which side of your train did you drop off, the northerly side or the southerly side?

A. North side.

Q. 34. On which side of your train did you drop off, the north side or the south side? I am speaking now as to the one along the eastbound track.

A. The train that I was riding on?

Q. 35. Yes.

A. I dropped off on that side next to the switch.

The Court—That's the southerly side?

The Witness—That's the southerly side.

A. Between the switch and the eastbound track?

Q. 36. Yes; you dropped off between the eastbound track and the siding. A. Yes, sir.

Q. 37. What did you do after you dropped off?

A. Went right through that space between the two coal cars and the five box cars.

The Court—Five empties?

The Witness—Yes.

The Court—All right. Refer to them as empties if you can, so that the jury will understand it better; we have had them referred to as "empties" all the way along.

Q. 38. You dropped off then, as I understand it, between the two empties and the two coal cars? A. Yes, sir.

Q. 39. And then what did you do, you say?

A. I went right through that space of fifteen feet, between the two coal cars and the five empties. I looked up and down the track both ways.

Q. 40. That is, after you went through between the two empties and the two coal dumps? A. Yes, sir.

Q. 41. You were then on the southerly side of the siding? A. Yes, sir.

Q. 42. And when you got to the southerly side of the siding, in between the two empties and the two coal dumps, what did you do?

A. I was on the driveway, I looked up and down the track, both ways.

Q. 43. Did you see anybody? A. No, sir.

Q. 44. See any children? A. No, sir.

Q. 45. How far could you see up and down the siding?

A. Practically where I stood I could see the full length of the switch.

Q. 46. Could you see all the way down to the westerly end of the siding? A. Yes, sir.

Q. 47. And could you see as far as the freight house?

A. Yes, sir.

Q. 48. Then what did you do?

A. I ran all the way down that driveway.

Q. 49. Toward what street??

A. Towards Hobart Place, east.

Q. 50. Then what did you do? A. Throw the D-rail.

Q. 51. D-rail where?

A. On the switch, D-rail on the siding.

Q. 52. That is the siding shown on the map?

A. Yes, sir.

Q. 53. Why did you throw the D-rail?

A. Well, I have to throw that on so we could back in.

Q. 54. Where was your train standing when you threw the D-rail? A. On the eastbound track.

Q. 55. How far was the hind end of your train from the point of the siding?

A. Well, I should say about twenty-five or thirty feet, maybe.

Q. 56. Well, what did you do?

A. Run down, throwed the main track switch.

Q. 57. Main track switch? A. Leading in the siding.

Q. 58. Was your train standing still or moving at that time? A. Standing still.

Q. 59. Then where did you go?

A. After I throwed the main track switch for the siding, I stepped right across the eastbound track, and give the conductor the signal to back up.

Q. 60. What did you do then?

A. Run back towards five cars that we were going to couple on.

Q. 61. Where were you when you ran back, between what tracks? A. On the eastbound track.

Q. 62. As you ran back, were you ahead of the hind end of your train?

A. I was ahead of the hind end of my train, yes, sir.

Q. 63. About how far?

A. Oh, I should say a couple, two or three car lengths.

Q. 64. How far did you run back along the eastbound track?

A. Back to just about the point where the coupling was to be made.

Q. 65. Well, where was that with relation to the cars on the siding?

A. That was the coupling was to be made on the siding at the five empty cars.

Q. 66. Did you go to the extreme rear end of the five cars which stood on the easterly end of the siding?

A. No, sir, not until after we coupled up.

Q. 67. Well, where did you stop when you went back along the eastbound track? A. After we coupled up?

Q. 68. No, before your train coupled up with the cars on the siding, and as you went back along the eastbound track, where did you stop?

A. I stopped about a point between—well, I should judge about the second and third hind car of the five empties in the switch.

Q. 69. Can you say where you stopped at that time with relation to the fence corner shown on the map?

A. Yes, sir, I could point it out to you.

Q. 70. Well, point it out if you will.

Witness marks with E. P. just where he stood.

Mr. Bain—I desire to have it appear upon the

record that the point marked by the witness is almost directly opposite the yellow cross on the map.

The Court—I understand you went back to a point opposite the easterly end of the five empty cars; is that right?

The Witness—Yes, sir.

The Court—And you stopped there?

The Witness—Yes, sir.

The Court—And that is the place where you now mark?

The Witness—When we coupled up, understand, I was at this point, well, you may say just as I marked it there, about two car lengths between the five empty cars that stood there.

Q. 71. That is, you were about in the center of the five empty cars at the extreme easterly end of the siding?

A. Yes, sir.

The Court—You didn't stop?

The Witness—Not right away; I made the coupling; no, sir.

The Court—You didn't stop at the easterly end of those five cars?

The Witness—No, sir.

The Court—You went back about two car lengths?

The Witness—Yes, sir.

The Court—And you were then on the northerly side of the switch?

The Witness—Yes, sir, on the eastbound track.

Q. 72. And at that time had your train started to back up? A. We had already coupled up.

Q. 73. You had coupled up at that time? A. Yes, sir.

Q. 74. And as you ran back along the eastbound track, how far could you see westerly along the siding; could you see to the end of the siding? A. Yes, sir.

Q. 75. See anybody around there?

A. No, sir; not a soul.

Q. 76. See any children there? A. No, sir.

The Court—Well, could you see to the westerly end of the siding on the south side?

The Witness—No.

The Court—Only on the north side?

The Witness—Only on the north side.

The Court—You had come up originally on the south side?

The Witness—Yes, sir.

The Court—Went down on the north side?

The Witness—Yes, sir.

Q. 77. And when you went through to the south side, after dropping off the train, you could then see, could you, to the extreme westerly end of the siding? A. Yes, sir.

The Court—On the south side?

Q. 78. On the south side? A. Yes, sir.

Q. 79. And also up as far as Bogart Place? A. Yes, sir.

Q. 80. And at that time I understand you to say that you saw nobody? A. No, sir.

Q. 81. How long did it take you after you dropped off the train to get up and turn the D-rail, to turn the switch point on the main eastbound track and to get back to where you stopped after the train was coupled?

A. Well, I figure that from the time I dropped off and went through the space around down, throwed the D-rail on the main track switch and backed up, I figured about 6 or 7 minutes, about 6 minutes.

Q. 82. How was your attention first attracted to any accident at that time?

A. When I stood at this point between the—that is in the middle of those five empty cars, there was a gentleman come across the tracks—he was a huckster—come across the westbound track, and as I was walking back to make the cut, cut those two dumps off, pull out the switch, I says to this

gentleman, I says, just in a passing remark like the time of day, "What's on your mind now?" "Why," he says, "there's someone hurt over there, I believe." I says, "I was there a few minutes before that," and at that I turned around and I faced the conductor easterly, he was up on top of the train. I beckoned to him to come down. In the meantime, this gentleman that I spoke to walked through this space between the box cars in the rear end of the switch and the two loaded dumps, and he must have picked the boy up.

Q. 83. You didn't see him pick the boy up?

A. No, sir; I did not. He picked the boy up, and at that time, by the time I got back there, why, our flagman, Mr. Devoe there, he come up.

Q. 84. Where was the huckster with the boy when you first saw him with relation to the cars on the siding?

A. He was on the southerly side of the cars with the boy in his arms.

Q. 85. Near which cars on the siding?

A. Right at the rear end of the two dumps and the two coal cars.

By the COURT.

Q. 86. What do you mean, at the rear end, the westerly end of the two dumps? A. Yes, sir.

Q. 87. Now, just let me get this straight. Had the five empties, when you had coupled with them, punched up against the two coal cars? A. Yes, sir.

Q. 88. So that you had to cut those off? A. Yes, sir.

Q. 89. And, therefore, it pushed back at least 15 feet?

A. Yes, sir.

Q. 90. And you went back to cut them off?

A. Cut them off.

Q. 91. And at that time the huckster spoke to you?

A. Yes, sir.

Q. 92. Did he have the boy in his arms then?

A. No, sir.

Q. 93. Was it the same man that spoke to you, that later had the boy in his arms?

A. I couldn't say that, there was two gentlemen there.

Q. 94. Now, then, he stood with the boy in his arms opposite the dumps? A. Yes, sir.

Q. 95. How far had the dumps moved back?

A. Well, I should judge about 9 or 10 feet, to the best of my judgment.

By Mr. BAIN.

Q. 96. Who gave the signal to the train to back up, the first signal? A. I did.

Q. 97. And to whom did you give the signal?

A. The conductor.

Q. 98. Conductor Madigan? A. Yes, sir.

Q. 99. Where was he standing?

A. On top of the cars, about the middle of the train.

Q. 100. Which way was Conductor Madigan facing?

A. Westerly.

Q. 101. Facing toward you? A. Yes, sir.

Q. 102. At any time after you dropped off the train first and up to the time of the accident did you see any children around the siding? A. No, sir; not a soul.

Q. 103. That's all.

By the COURT.

Q. 104. Let me just ask you one question: Did you go over to the south side after the huckster had the boy?

A. Not on the extreme south side.

Q. 105. You didn't stop to look to see whether there was any blood on the ground? A. No, sir.

Q. 106. Didn't see any blood on the ground?

A. No, sir; Mr. Devoe was there.

Q. 107. What I wanted to get at is, you don't know then exactly where the boy was run over?

A. Well, the only thing that I could state that he was—he was run over by the westerly truck on the south side of the two dumps.

Q. 108. The westerly truck of the two dumps; what do you mean by that?

A. The westerly truck on the south side of the track, farthest west.

Q. 109. The rear or forward end of that? A. Rear end.

Q. 110. That is merely a surmise, you didn't see any evidence on the ground as to where the blood was?

A. No, sir, only just from where I seen this man standing when he had the boy.

Q. 111. You don't know where he picked the boy up?

A. No, sir.

By Mr. BAIN.

Q. 112. How far were you from the rear end of your train when you gave the signal to back up?

A. Well, when I first give the signal I was just merely about a car length, but as we backed up, why I ran up towards the five cars.

Q. 113. Did you run faster than the train was traveling?

A. Yes, sir.

Q. 114. How fast was the train traveling at that time?

A. When we first started to back up we was moving about four mile an hour, but when we got close we were maybe traveling about a mile and a half or two mile.

CROSS-EXAMINATION, by Mr. GREENSTONE.

Q. 115. Mr. Pruner, how long have you been employed by the Erie? A. Well, the second time about 3 years.

Q. 116. Three years? A. Yes, sir.

Q. 117. How long have you worked on this job here?

A. This job?

Q. 118. Yes, switching there?

A. I worked quite a bit off and on.

Q. 119. You are quite familiar with the place there?

A. Well, I know the situation fairly well, yes.

Q. 120. You know that children play there quite often?

A. I have seen children playing there, yes.

Q. 121. On the south side of this siding? A. Yes, sir.

Q. 122. And where were you going with this train of cars after you coupled all the cars together?

A. Saddle River.

Q. 123. What time were you to get there?

A. Well, around two o'clock when we was in the switch, and, of course, it would be only maybe 10 or 15 minutes by the time we got to Saddle River; 10 minutes, say.

Q. 124. You were supposed to get there about 2:10 or 2:15? A. Yes, sir.

Q. 125. As a matter of fact, don't you know this accident happened about 2:15? A. Well, that's my—

Q. 126. You were a little late there getting those cars out?

A. We have no regular time; it is merely as you get there all right.

Q. 127. You were in a hurry, weren't you?

A. No, sir, not necessarily.

Q. 128. Now, you must be quite a good runner as a rear brakeman there? A. I am a fast boy on the back of a car.

Q. 129. Run faster than the train does at 4 or 5 miles an hour, 6 miles an hour? A. Can I?

Q. 130. You have to run faster than the train goes?

A. I can run as fast as our train is backing in the switch, yes.

Q. 131. And when you dropped off, I understand that you dropped off about opposite the place where this boy was hurt? A. Yes, sir.

Q. 132. Now, you then cut right through those cars?

A. Yes, sir.

Q. 133. That open space, looked up and down?

A. Yes, sir.

Q. 134. Saw no one? A. Saw no one.

Q. 135. And then you ran right up ahead to the switch?

A. Looked up and down the switch both ways.

Q. 136. I heard that; then I am asking you now, then you ran right up ahead to the switch? A. Yes, sir.

Q. 137. The train was going off all this time, was it?

A. It had left me when I went over the main track switch.

Q. 138. Yes; continued on beyond the switch? A. Yes.

Q. 139. You knew that you had to throw that switch?

A. Yes, sir.

Q. 140. So that the train would make the cross over on the siding, is that right?

A. I know that I had to throw that switch so that train could back in.

Q. 141. Make the crossover; there was a crossover, D-rail? A. No crossover; there is a D-rail.

Q. 142. From the D-rail to the siding?

A. The D-rail is in the siding.

Q. 143. You crossed over from the main line into the siding?

A. No, I didn't cross over; it is the switch leading off from the main track.

Q. 144. Well, wasn't part of the train on the main line and part of it on the siding; that so? A. Not at that time.

Q. 145. Afterwards? A. Yes, sir.

Q. 146. In order to make this crossover from one track to another on this D-rail you had to throw that switch; isn't that so? A. Yes.

Q. 147. Now, they were waiting for you to thrown that switch, weren't they?

A. Yes, sir, I throwed the switch.

Q. 148. You were the man to both inspect to see if there were any children there— A. Yes, sir, which I did.

Q. 149. —and run up there and throw the switch?

A. Yes, sir.

Q. 150. Now, how far distant was that from the place where you stopped to inspect up and down looking for children, and the switch, how far a distance is that?

A. Well, I should judge 12 to 14 car lengths, about 12 car lengths.

Q. 151. That would be about, say 40 feet to a car length?

A. No, sir, not always, you can figure on from 35 to 37 feet.

Q. 152. Well, take 35 feet; 12 times 35 would be 420 feet; is that right?

A. Well, that's what your figure says, well, all right.

Q. 153. That's about two city blocks, about the length of two ordinary city blocks; isn't that so?

A. Well, not quite that.

Q. 154. Well, we know that's so. Now, you did not stop there for any considerable length of time while you were looking up and down for children, did you?

A. Well, no, I didn't tarry, not a minute.

Q. 155. You just glanced up and down the track and then ran right up?

A. I looked up and down and then went.

Q. 156. They were waiting for you to attend to the switch?

A. They were waiting for me and they didn't want to wait very long.

Q. 157. You didn't want to keep them waiting very long? A. No, sir, that's our business to get busy.

Q. 158. Now, you ran right up and turned the switch after that and signalled to the conductor to drive on the switch? A. Yes, sir.

Q. 159. And then you ran ahead of the train?

A. Yes, sir.

Q. 160. The train running about alongside of you, the rear end of the train running about alongside of you?

A. Yes, sir, about a car length, two car lengths away.

Q. 161. Back of you all the time? A. Yes, sir.

Q. 162. Well, and did you, when you got opposite to this place where this boy was hurt,—I understand you got back to the same place practically where you jumped off; is that so? A. Not quite.

Q. 163. About how far away from you? A. About three car lengths.

Q. 164. Towards the switch or away from it?

A. Towards the switch?

Q. 165. Three car lengths away from the switch or nearer to it from this point where you first dropped off?

A. Three car lengths easterly.

Q. 166. That would be towards the switch, wouldn't it?

A. Yes, sir.

Q. 167. And had the rear car passed you at that time?

A. No, sir.

Q. 168. Was it still back of you that one car length you mention? A. Yes, sir; I was not a car length from them.

Q. 169. You kept about a car length ahead of the train, is that so, as it was coming down? A. Yes, sir.

Q. 170. And then you signalled for the car to stop?

A. Yes, sir.

Q. 171. Now, you thought it had reached the right distance to make the coupling A. Yes, sir.

Q. 172. But you somewhat miscalculated the distance, didn't you? A. No, sir.

Q. 173. Well, didn't you couple up two cars that were not intended to couple up?

A. Well, that would be a natural thing, as you are backing up a train with 20 or 30 cars. And when you give a signal to stop, why the slack will naturally run out a distance.

Q. 174. I see. And you forgot to allow for the slack?

A. I allowed for that; that was supposed to be allowed.

Q. 175. Well, why did you get those two cars then?

A. Because as I give my signal to stop, why before they stopped the slack ran out of the train, and simply coupled up them two cars.

Q. 176. I understand that, but you knew that the slack would take in 15 feet, in adddition; didn't you realize that a train of 20 car lengths would take in about 15 feet, as you say? A. Yes.

Q. 177. Didn't you allow for that?

A. Allowed every bit of it.

Q. 178. You miscalculated or the engineer miscalculated, which? A. No, sir, the engineer was right on the job.

Q. 179. But you managed to get those two cars that were not intended to couple up?

A. Well, that there, I told you—

Q. 180. You don't know how to explain that, do you?

A. That's as near as I can explain it.

Q. 181. Well, for instance, if you saw a man standing, say 15 feet away from where you thought the car would stop, or any object standing there and you did not want to strike that object, would you think you were exercising enough care by giving a signal, and the car, when taking in that 15 feet of slack—

Objected to.

Objection sustained.

Q. 182. Is it a common thing to strike objects 15 feet away when it is intended to stop 15 feet ahead.

Objected to.

The Court—I will allow him to answer that.

A. Sometimes you are backing up against a train where you have 20 cars, two cars, or if you have 100; you give an engineer a signal, and you never give him a stop signal until you fetch up—manys and manys a time; you use your own judgment.

Q. 183. You have to be quite careful about those things, don't you? A. Yes, sir, in a place like that.

Q. 184. And very often you miscalculate?

A. Well, any man is liable to misjudge.

Q. 185. And at that time there was some miscalculation?

A. No, sir, not on my part of giving the signal.

Q. 186. But there must have been on somebody else's part in taking in those two cars?

Objected to.

Objection sustained.

A. No, sir.

Q. 187. As far as you intended to signal, you did not intend to take in those two cars, is that so?

A. That wasn't on my mind; if we coupled up to them all right; if we didn't, all right; it was not material to me.

Q. 188, Well, you didn't want to come in contact with the two cars; it wasn't intended to couple up with the two cars? A. It made no difference.

Q. 189. So that you were not particularly careful about whether or not it coupled up those cars that were not intended to couple up?

A. I am particular in the line of business that I am working at, yes, sir.

Q. 190. Well, now, was it a custom then, for you to work in that fashion, that if it did couple up a car that was not intended to couple up it was immaterial for you?

Mr. Bain—I object to that as immaterial.

The Court—I think the question is quite unintelligible and that seems to me to be the most competent objection to it, so I sustain it on that ground.

Mr. Greenstone—I withdraw the question.

Q. 191. Did you very often miscalculate the distance in coupling up cars?

Mr. Bain—Objected to on the ground it is immaterial.

The Court—What difference does that make?

Mr. Greenstone—I just wanted to show the manner of working that was performed on the siding with knowledge of the conditions there existing.

The Court—What difference would it make whether they miscalculated or whether they didn't miscalculate? The negligence that I presume you rely upon in this case is not the running in of the car too rapidly.

Mr. Greenstone—Just not keeping a proper look-
10 out.

The Court—Then it does not make any difference whether they ran into it too rapidly or not; they might have gone into it at 100 miles an hour.

Q. 192. Then you stayed there and watched the coupling up on the main line? (No answer.)

Q. 193. You stood there on the main line, the north side of the siding, and watched this coupling up?

A. Yes, sir, I seen the coupling made.

Q. 194. Then you went over to the additional two cars
20 and cut them off?

A. Yes, sir, that was my intentions.

Q. 195. Well, did you do that? A. After.

Q. 196. How long after?

A. Well, I should judge about 5 or 6 minutes.

Q. 197. 5 or 6 minutes after? A. Yes, sir.

Q. 198. After the train had come to a stop?

A. Yes, sir.

Q. 199. You say it took you about 5 or 6 minutes before you started to go off the cars after the train stopped?
30 A. Yes, sir.

Q. 200. How long before you cut off these cars did you talk to this man you say that came across the track?

A. I hadn't cut off the cars yet when I spoke to this gentleman.

Q. 201. I see. You had met him before the train had stopped?

A. Just as we was coupling up, just about as we were ready to couple up.

Q. 202. Just about as the train was coupling up?

A. Yes, sir.

Q. 203. About to come to a stop?

The Court—What do you mean by that, you had already coupled up?

The Witness—Well, when we coupled up, you know, why, the train stopped; just about the time that the train stopped after we coupled up, why this gentleman I spoke to.

Q. 204. Now you don't know, as a matter of fact, whether it was before the train stopped or not that you spoke to this gentleman?

A. Yes, sir, after we coupled up and the slack had run out and the train was standing still, I was just on the point of walking back to make this coupling, this gentleman I spoke to.

Q. 205. Now, you say it was after the train stopped that you spoke to this man?

A. Yes, sir, after the train had stopped.

Q. 206. Where did this man come from?

A. Well, he come from the northern side of the track over the westbound track; he was up in those houses, I guess, delivering some goods.

Q. 207. You mean he cut right through the train?

A. This man come from the northerly side of the track.

Q. 208. The extreme opposite side of the main line?

A. Westbound track, yes, sir.

Q. 209. That is from this point here, come across this way (indicating)?

A. Yes, he come across this way.

Q. 210. Came from the other side? A. Yes, sir.

Q. 211. All the way across the westbound track to where you stood?

A. Yes, sir, he was a little distance away from me.

Q. 212. What did he say to you?

A. He didn't say anything to me; I says to him just to pass the time of day "What's on your mind now?"—something of that sort.

Q. 213. Do you remember having said he told you there was a boy hurt, somebody hurt?

A. Yes, sir, he told me there was somebody hurt.

Q. 214. He did say something to you?

A. He said there is someone hurt on the other side.

Q. 215. Why did you say a moment ago he didn't say anything; and you now say he did say something to you?

Mr. Bain—He didn't say any such thing.

The Court—I overrule the question on the ground it contains an unwarranted assumption of fact.

A. This gentleman never spoke to me till I spoke to him.

Q. 216. Do you mean before you spoke to him he didn't speak to you, is that it? A. Yes, sir.

Q. 217. Now, he said to you there was someone hurt on the other side of the track? A. Yes, sir.

Q. 218. And what did he do then, after this conversation?

A. Well he walked through the space between the two rear cars and two coal dumps.

Q. 219. After you had cut them off?

A. No, sir; I hadn't cut them yet; before I cut them.

By the COURT.

Q. 220. Where did he come from, Bogart Avenue or a point on the northerly side of the track?

A. He come from a point on the northerly side, right across the westbound and eastbound track.

Q. 221. How could he have known anyone was hurt?

A. I don't know, only he was standing there and them's the very words he said to me; I don't know how he knowed it.

Q. 222. How do you know where he came from?

A. He was right there before my eyes.

Q. 223. You saw him come?

A. Yes, sir; he was on the westbound track when I spoke to him.

By Mr. GREENSTONE.

Q. 224. Quite sure about that, aren't you?

A. He was on the westbound track coming right across.

Q. 225. Walking?

A. Walking on the westbound track.

Q. 266. Walking across the westbound to the eastbound track; and what did you do then when he told you that someone was hurt?

A. I just simply turned around and beckoned to my conductor to come down.

Q. 227. Well, what then?

A. He come down, and by that time this gentleman had went through the space and picked up the boy and the boy—

Q. 228. What did you do then? A. What did I do?

Q. 229. Yes.

A. Well, when this boy was picked up by this gentleman, our flagman there, Jake Devoe, he come up the track and he throwed me the flag; he says, "You look out for the hind end," he says, "and I will take the boy down to the depot."

Q. 230. So you say this man that crossed the westbound track cut across between the cars? A. Yes, sir.

Q. 231. That you had not as yet cut off?

Mr. Bain—Objected to on the ground it is a misstatement of the facts.

Q. 232. Well, which cars were they—I don't want to—

A. The two box cars and two dumps on the westerly end of the switch.

By the COURT.

Q. 233. As I understand it, the twenty cars that were attached to the engine had coupled to the five empties?

A. Yes, sir.

Q. 234. And the five empties had coupled with the two dumps? A. Yes, sir.

Q. 235. Now, then, you didn't want to take out the two dumps, so you were going to cut those off? A. Yes.

Q. 236. But the two dumps had not coupled with the two box cars at the extreme westerly end of the switch?

A. No, sir.

Q. 237. There was a space there? A. Yes, sir.

Q. 238. That was the space this gentleman went through?

A. Yes, sir.

By Mr. GREENSTONE.

Q. 239. How much of a space was that, about?

A. I should judge about 11 or 12 feet left after we coupled up.

Q. 240. Well, now, after the train had coupled the cars, wasn't there a rebound, that is a withdrawal of the train back? A. Yes, sir.

Q. 241. How much was that about?

A. Well, that would be a hard thing to judge, I should say a couple of feet, maybe.

Q. 242. Well, isn't it about 10 or 15 feet?

A. Oh, no, no.

Q. 243. How about the slack?

A. Well, the slack would run in, there would be one or two vibrations.

Q. 244. Well, out of that 15 feet of slack, wouldn't a good portion of it be taken up by a back drawing of the cars on the slack?

Mr. Bain—Question objected to on the ground it is unintelligible.

The Court—I think I will sustain that unless the wtiness understands it.

Q. 245. Do you understand what I said?

The Court—Do you know what is meant by a back drop?

Mr. Greenstone—Back drawing of the slack.

A. Well, an adjustment of the same slack that had gone out.

Q. 246. You mean the rebound of the train?

A. Well, it is not—

Q. 247. And the slack runs out—

By the COURT.

Q. 248. What I think he means is this; when the engine is brought to a stop the cars continue to go ahead, that is to say they let themselves out to their full length. A. Yes.

Q. 249. That is the slack that is in the coupling, each one? A. Yes.

Q. 250. Now, you say that on a train of this size that slack would be about 15 feet; do I understand you to say that?

A. Run on after you give the engineer the signal to stop.

Q. 251. After the engineer stopped, what would be the run out?

A. Well, the run out would be about—of course, now, I ain't figuring on the engineer, you know, when he gets the stop signal, he don't stop right off the reel.

Q. 252. Now, what we want is, after the engineer has stopped, then the cars move until they have taken up all this slack, don't they? A. Yes.

Q. 253. How much would that be on a train of this size?

A. That would be about, the slack would run out about 15 feet.

Q. 254. Now, then, after they have done that, there is a drawing back again, isn't there? A. Yes.

Q. 255. Or sort of a reaction? A. Yes.

Q. 256. How much would that be?

A. That would be, I might say pretty near the same distance; that is—

Q. 257. Would they start back 15 feet and then get a rebound of 15 feet?

A. It wouldn't go up as much as when the train ran out.

Q. 258. That must necessarily be so because the momentum is gone, isn't it? A. Yes.

By Mr. GREENSTONE.

Q. 259. So that you say there was a space of about 9 or 10 feet then left? A. Yes.

Q. 260. Through which this man passed, and that there was first a slack of about 15 feet?

The Court—Now, we have gone over that, Mr. Greenstone; just don't ask questions for the sake of asking them. It only consumes time and does not get you anywhere.

Q. 261. When the train drew back then, this man passed through, is that so? A. Yes, sir.

Q. 262. You don't know how far these two rear cars travelled?

Mr. Bain—I object to that on the ground it is a misstatement of the testimony; no evidence the two rear cars travelled at all.

The Court—What do you mean the two rear cars?

Mr. Greenstone—The two last cars.

The Court—The two dumps or the two box cars?

Mr. Greenstone—The last cars on the siding toward the freight house.

The Court—There is no evidence to support the theory that the two box cars on the extreme west

moved at all. On the other hand, the evidence is to the contrary; there is nothing that moved them. You may ask him the question whether they did move, but your present question assumes that they did move without any evidence to support it. Did the last two cars move at all?

The Witness—No, sir.

Q. 263. Now, where did you say this boy was picked up?

Mr. Bain—Objected to on the ground that this witness did not see the boy picked up.

The Court—He said that he did not know; he can only guess.

Q. 264. Well, what is your best guess?

The Court—I don't think we are concerned with guesses, Mr. Greenstone.

Q. 265. You say you saw the man pick him up?

A. No, sir, I did not.

Q. 266. Didn't you say a little while ago you saw the man go over and pick him up? A. No, sir.

Q. 267. What did you see the man do?

A. I seen the man standing with a child in his arms.

Q. 268. Where was he standing then?

A. Right on the southerly side of the switch in the drive way.

Q. 269. On the southerly side of the switch in front?

A. In the drive way.

Q. 270. In the drive way? A. Yes, sir.

Q. 271. And right near those two coal dumps?

A. Yes, sir.

Q. 272. And there were two empties back of them towards the freight shed?

A. Well, there was two cars there, yes.

Q. 273. What did you do then, you and Madigan, both?

A. What did I and Madigan do?

Q. 274. Yes.

A. Why, after we seen the boy was all right and in care of somebody we proceeded on our way to Saddle River.

Q. 275. Did you go over and talk to this man when he had the boy in his arms?

A. Well, Devoe was doing that.

Q. 276. Did you signal to Devoe to come over?

A. No, sir, Mr. Devoe come up from the flag.

Q. 277. Came along himself? A. Yes, sir.

Q. 278. Over to you?

A. Not to me, up to the man that had the child in his arms.

Q. 279. And he threw the flag to you? A. Yes, sir.

Q. 280. And he told you also there was a boy hurt, is that so? A. Yes, sir.

Q. 281. So that both this man you say who crossed the westbound track knew the child was hurt and, as far as you know at that time, Devoe knew that the child had been hurt? A. Yes, sir.

Q. 282. And you had known nothing about it?

A. No, sir, I was on the extreme northerly side.

Q. 283. And you were the nearest of these two men to the place where this child was hurt? A. Yes, sir.

Mr. Bain—Objected to on the ground there is nothing in the testimony to support any such conclusion as that.

The Court—What do you mean by the two men?

Mr. Greenstone—Devoe and the man across the westbound track. Devoe was up towards the station about 400 feet off.

Q. 284. Did you go over at all and see how badly this boy was hurt?

Mr. Bain—Objected to.

Objection sustained.

Q. 285. Did you see anybody else but this man and boy together? A. No, sir, not a soul.

Q. 286. You did not see a little boy there? A. No, sir.

Q. 287. Besides? A. No, sir.

The Court—He means another boy?

The Witness—No.

Q. 288. Did you cross over at all to the drive way to look and see what happened?

A. No, sir, not all the way; I didn't have any occasion. I was between the track and the siding, between the two rails.

Q. 289. Well, when this thing happened, when Devoe went over there, did you cross over to see what had happened, what had taken place?

A. No, sir, the time when I walked back the length of those three cars, this here gentleman had stepped through and had the child there, right in his arms, when I got back there, he was standing there and Mr. Devoe came right up.

Q. 290. How long did he stand there?

A. Not very long, 3 or 4 minutes.

Q. 291. How long? A. About 3 or 4 minutes.

Q. 292. And all of that time you stayed on the other side of the cars, what were you waiting for?

A. I stood there, yes, walked down towards the opening where this gentleman passed through.

Q. 293. And could you see the man and boy there from where you stood?

A. Yes, sir, through the gap.

Q. 294. You at no time went over to relieve the man who had the child in his arms?

Objected to.

The Court—Sustained. Utterly immaterial.

Q. 295. You heard the man testify that he looked around and saw no one there, this man Kissler?

Objected to.

The Court—Sustained. What difference does it make what this witness heard; the only people who

are concerned with what the witnesses testified to are the jury and the Court.

Mr. Greenstone—I just wanted to know whether he would say that the man was mistaken.

The Court—That does not make any difference. He is not the person to characterize the testimony of another person.

Q. 296. You are quite sure that you were in full view of this man and boy as they stood there? A. Yes, sir.

Q. 297. When you went over to this cut A. Yes, sir.

Q. 298. And how far away were you from them then; how far away did you stand there those 3 or 4 minutes?

A. Well, I as about as far as—well, 25 feet—20 or 25 feet.

Q. 299. 20 or 25 feet?

A. I don't think it was that—well, as far as from here to that railing there.

Q. 300. And did Madigan come over too?

A. Yes, sir.

Q. 301. Madigan also stood there?

A. Madigan he told Mr. Devoe to look out for the child, and we proceeded.

Q. 302. How long did Madigan stay there?

A. Well, he wasn't there very long; he just simply come back and spoke to Mr. Devoe.

Q. 303. Then did you give the signal for the train to go ahead and get on?

A. Yes, sir; after I cut the two dumps off.

Q. 304. You are quite sure that Devoe had approached you and thrown the flag to you, you have testified?

A. Yes, sir.

Q. 305. That right? A. Yes, sir; thrown the flag to me.

Q. 306. How near did he come to you when he approached you? A. How near?

Q. 307. Yes.

A. Well, he was just in those 20 feet or so when he threw the flag to me; he was at the boy then, when he throwed the flag to me; that's when he took the boy in his arms.

Q. 308. That's all.

Defendant rests.

Testimony closed.

Mr. Hobart—Your Honor please, I ask for a direction of verdict on behalf of the defendant. I will first state the grounds: First, there has been no negligence shown on the part of the defendant or any of their servants or agents. Secondly, the accident was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr. Third, the plaintiff, Hilt, Jr., was a trespasser on the property of the defendant, and the defendant did not violate its legal duty to the plaintiff as such trespasser. Fourth, the accident was due to contributory negligence on the part of Hilt, Jr., in walking, standing or playing on the defendant's railroad, in violation of Section 55 of the Railroad Act (although I think, without reference to Section 55, there is still contributory negligence in that respect). Fifth, that the accident was due to contributory negligence on the part of Hilt, Jr., in failing to take reasonable care to observe or inform himself of the approach of the train. Sixth, that the evidence shows a violation of Section 55 of the General Railroad Act, and, in so far as Edwin J. Hilt, Sr., is concerned, that the accident was due to his negligence in permitting and allowing Hilt, Jr., to go into this position of danger.

The Court—I feel that this case is controlled by the decision of the Circuit Court of Appeals of the Third Circuit in *Erie Railroad Company* v. *Swiderski*, 197 *Fed.* 521, and the principle underlying one feature of that case which was announced by the Circuit Court of Appeals of the Third Circuit in *Snare & Triest Company* v. *Friedman*,

169 *Fed.* 1. On the question of negligence on the part of the defendant, I think that there are facts from which the jury could infer that the servants of the defendant company, who admittedly knew of the tendency and practice of children to play in and about the switch and the freight cars thereon, did not exercise the reasonable care which the law required of them, either to detect the presence of the plaintiff and his companion or to give them warning of the intended approach of the train on the switch. It is true that the brakeman who gave the signal for the train to approach testified that he got off the rain while it was on the eastbound track, walked across the opening between the two coal cars and the five empty cars to the southerly side of the switch track, and looked up and down and saw no children or anyone either on or in the vicinity of any of cars which were on the switch. That he then went to the switch, turned it and before the cars got on to the switch track he looked again and did not see anybody. There is, however, the testimony of the plaintiff, the boy, that he and his companion had been playing alongside of the car which caused his injury for a period of an hour before the accident. If the jury see fit to believe this testimony (and they, of course, are the body which is to pass upon the credibility of the testimony) they would be justified in inferring either that the brakeman did not look as he testified or that if he did look he looked in a very cursory manner. Of course, there is the possibility that at the time when the brakeman looked the boy was practically hidden underneath the car, while he was endeavoring, as he testifies, to get the marble which had gone under the car, but the testimony also is that five or six minutes elapsed between the time that the brakeman first came between the cars and the time when the train could have reached the five empty cars and started them in motion. The jury would be justified in finding from

the boy's testimony that he was underneath the car for only a very short period of time; and, as he was injured while under the car, that he had gone under after the brakeman first looked. If the jury should find this fact, it would then be justified, as I have stated before, in inferring that the brakeman either did not look or that his looking was not of the character which reasonable care would have required. On the question of contributory negligence, two propositions are urged: one, that by virtue of Section 55 of the Railroad Act, the boy was guilty of contributory negligence, because he was playing on the track. If it be considered that he was playing, then the decision of the Circuit Court of Appeals in *Erie Railroad Company* v. *Swiderski* is applicable, and the statute under that decision does not apply to a child of his tender years. I doubt, however, whether it could be said that this boy was playing on the track in the sense of the statute, because the tendency of the courts of New Jersey in construing this statute has been to give it a strict construction. For instance, in *Feury* v. *New York Central*, 67 *N. J. Law* 270, it was held that a person walking *across* the track was not within the statute, because the statute used the expression "Walking along the tracks." The next ground upon which it is urged that the case should be taken from the jury is that irrespective of the statute the boy was so clearly guilty of contributory negligence that reasonable men could not differ as to their conclusion in this respect, and consequently that it is for the Court to take the case from the jury. I am not prepared to say, in view of the boy's testimony, that he was of such immature age that he could not be held under any circumstances guilty of contributory negligence, but I think that he must be held to the degree of care for his own safety which an ordinary boy of his age and intelligence would have exercised for his own safety under the circumstances, and in the environment which then surrounded him.

This is the rule which has, as I understand it, been finally adopted by the Court of Appeals of New Jersey in *David* vs. *West Jersey and Seashore Railroad Company,* 84 *N. J. Law* 685. I think that, under the circumstances of this case, it is for the jury to say whether or not this boy, at the time he was injured, was in the exercise of the care usually exercised by persons of similar age, judgment and experience, as he, under circumstances similar. It is further urged that the boy was a trespasser and that, consequently, the defendant company owed to him only the duty to refrain from acts wanton and wilfully injurious. There is no doubt the boy was a trespasser, and that if this were a case of an adult or a person of more mature age and judgment that, quite irrespective of the question of contributory negligence, it would be necessary for the court to direct a verdict in favor of the defendant, because the case is devoid of any evidence of wanton or wilful injury. But I think that the doctrine of the courts of New Jersey, which has been adopted in so far as the Federal Courts in the State of New Jersey are concerned, by the Circuit Court of Appeals of this Circuit, in *Schmidt* vs. *Pennsylvania Railroad Company,* 181 *Fed.,* is inapplicable to a child of tender years and immature age, who is attracted to the property of a defendant for purposes of play; and such, it seems to me, follows as the inevitable result of the decision of the Circuit Court of Appeals in *Snare & Triest* vs. *Friedman,* 169 *Fed.* 1, and all the line of cases upon which that case proceeds. For instance, in *Railroad Company* vs. *Stout,* 17 *Wall.* 657, which was the pioneer case adopting the Federal turn table rule, the injured child was a trespasser. While in both Snare & Trieste and Swiderski cases, the pile of girders and the railroad tracks, respectively, were in the public street. Still I do not think, when the circumstances of *Railroad Company* vs. *Stout* are considered, that the actual location of the instrumentality which

attracts the children and which causes their injury is a controlling circumstance. If the railroad company knew, as the evidence tends to prove, that children were in the habit of playing in and about this switch and the cars thereon, the jury may find that it was the duty of its servants and agents before backing in the train, in the exercise of ordinary care, to avoid injury, which the known presence of children would give them reason to anticipate would result from a failure to exercise ordinary care, to use care to see that the children were warned away before the train was backed in; in fact the Circuit Court of Appeals in the Swiderski case said that they had held in the Snare & Trieste case that an immature child could not, by reason of tender age, be charged with being a trespasser. For these reasons, I feel that the motion for a direction of a verdict should be denied. Defendant will be allowed an exception.

Which exception is hereby allowed and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

Defendant's counsel hands to the Court requests to charge as follows:

1. Defendant was under no legal duty to build or maintain a fence at the place where the accident occurred, and no verdict can be rendered against defendant merely because there was no fence at that place

2. Plaintiffs are not entitled to recover unless the jury find that the defendant's servants backed the train into the siding without due lookout for, or warning to persons in or about the cars standing on the siding.

3. Plaintiff, Edwin J. Hilt, Jr., cannot recover if the jury find that he knew it was dangerous to be under the cars or on the siding and did not exercise reasonable care at the time of the accident.

4. If the jury find that the plaintiff, Edwin J. Hilt, Jr., was negligent, and his negligence contributed to his injury, then the plaintiff, Edwin J. Hilt, Sr., cannot recover.

5. The mere fact that at times children played on or about the siding is not sufficient to justify the jury in finding that the defendant customarily permitted them to play there.

CHARGE.

GENTLEMEN OF THE JURY: At the outset I want you to bear in mind that we are trying in this case really two actions. The first is an action brought by the boy, Edwin J. Hilt, Jr., against the Erie Railroad Company, to recover for damages which he claims he has sustained as a result of negligence on the part of the employees of the company. The second action is brought by the father to recover against the same company for the same cause, that is to say, the injury sustained by the boy, to recover the damages which the father claims that he has sustained, and will sustain as a result of the boy's injury, due to the loss of service of the boy between the time when he reaches the period of life where he would be of some service, until he has reached the age of 21 years. Now, both cases, so far as we need consider, under the evidence, depend upon the—that is to say the liability,—depends upon the same set of facts. If the boy is not entitled to recover, the father is not entitled to recover. The right of the father to recover depends upon the right of the boy to recover. If there has been in the case any evidence that the father had not exercised due care in controlling the movements of the boy, and that as a result of the father's failure to exercise that degree of care, the boy has been injured, then, although the boy might recover, still the father could not recover. But there is no such evidence, so we may consider one case

depending upon the other, that is to say, the father's case depending upon the boy's.

Now, as I have heretofore charged juries, of which you have been members, it does not follow, simply because a person has been injured, that the person or company which caused the injury must respond in damages to the person injured for the injury so inflicted and suffered. There must appear in a case, before one can recover damages against another for injury suffered, something in addition. Now in the first place, it is necessary, in order that damages may be recovered by one against another for an injury, that there be facts from which, as a matter of law, a duty has arisen on the part of the person who inflicted the injury;—and when I use the word "person" in this respect, I mean to include firms or corporations, their agents and servants acting within the scope of their authority,—a duty on the part of that person towards the person injured; and in the second place, it must appear that there has been a breach of that duty.

It is claimed in this case (and the basis of the plantiff's right to recover is) that the defendant company, through its servants and agents, was negligent in its actions towards this boy. Now, in the first place, we must ascertain whether or not the law cast a duty, as I have stated, upon the defendant company in respect to this boy, and then whether or not there was a breach of the duty. Negligence may be generally defined, for the purpose, of this case, as a failure to exercise that degree of care which the law requires that one shall exercise towards another under certain given circumstances. Now, let us see what the facts are, upon which the plaintiff claims that a duty arose, under the law, on the part of the defendant company to the boy. You will recall that this accident took place on property of the railroad company, on a track belonging to the railroad company, in the City of Garfield, used by the comapny for the purpose of switching freight cars to enable persons

who had freight coming to Garfield, to come there and get the freight from those cars, and, in certain cases, to permit persons who wished freight to be taken from Garfield, to come there and load it upon the cars. There is evidence in the case tending to prove, and I think that it is uncontradicted, that for a long period of time—several years in fact—children in the neighborhood of the freight station and this switch track, were in the habit of congregating for play in and about the switch track and the cars, that from time to time were placed thereon. There is evidence tending to prove (and I think this is uncontradicted) that the employees of the company were cognizant of the fact that the children were thus accustomed to play, and that they had taken such notice of it that on many occasions, and with considerable frequency (there is some conflict in the evidence as to the degree of the frequency) the employees of the company, as well as the police of the town, had driven children away from that switch track and away from the cars that from time to time were located thereon. And the evident reason why that was done was because, in the very nature of things, children playing in and about that track and those cars were liable to be injured. Now, then, there arose from that fact another very essential fact which you would be justified in finding from the fact that children were in the habit of congregating there, and that the railroad company knew that they were accustomed to do so, and had driven them away, and that is this, that the defendant company and its servants and agents would, in the ordinary course of events, anticipate the presence of children in and about that switch track, and the train and cars that might be located thereon. Now, then, if they anticipated that children would be playing in and about those cars, there arose on their part a duty, so far as children of tender and immature years were concerned, to exercise ordinary and reasonable care to avoid injury. What might be reasonable care under one set of circum-

stances might not be reasonable care under another, and I am going to discuss that with you in just a moment. Now, if this boy had been a person of older years and mature judgment, if he had been an adult, then there would not have arisen on the part of the railroad company the duty to exercise ordinary and reasonable care to protect him, because under those circumstances he would have been a trespasser on the property of the railroad company, and the duty which the railroad company would have owed him then would have been only the duty to refrain from acts wantonly and wilfully injurious. Now, you can readily see that if this boy had been an adult, under that rule, there would have been no liability in this case, because there is no evidence whatsoever to show that any employee of the company wantonly or wilfully did anything to injure this boy. But the boy, being of immature years and judgment and experience,—being I think, at the time of the accident, 6 years and five to six months of age,—the railroad company owed to him a different duty, providing that this had reason to anticipate that he was likely to be there, and that was to exercise ordinary and reasonable care to see that he was not injured.

One can never be charged with negligence, except in some extreme cases (which it is not necessary for me to take up with you now), unless he has reasonable cause to believe that what he is doing is going to injure a person. If the railroad company did not know that children were in the habit of congregating in and about that place, it would have no reason to anticipate their presence there, and, therefore, if it failed to take precautions to warn them away, or see that none were there before it moved its trains to and fro on that track, there would be no breach of duty, because it would not have known, and its servants and agents would not have known or had reason to anticipate that children would be there. But in this case there is evidence

tending to prove, and as I state, I think it is uncontradicted, that the frequency with which children went there was such that the railroad employees anticipated the presence of children at this point. Now, having defined what the duty was, namely, to exercise ordinary and reasonable care to see that those children were not injured by the movements of the trains to and fro, &c., you must find in the case in the first instance facts from which you can say that that duty arose, namely, that the railroad company and its employees had reason to anticipate that children would be there. If you find that fact, then the duty, as a matter of law, arises, and if you find that a duty existed, the next question is, was there a breach of that duty? Did they fail—did the company or its employees fail to exercise ordinary and reasonable care to avoid injuring children playing there? Now, that is the first really important question in the case that you must resolve, because the facts from which you are to find the duty, I think, are quite uncontradicted. There has been reference in the summing up of counsel for the plaintiff to a duty on the part of the railroad to have fenced off a part of its property where this switch track was located. Now, I am constrained to charge you that in the exercise of the ordinary care which the law requires it should exercise, as I have heretofore indicated, it was not necessary for it or incumbent upon it to have erected a fence or other barrier to keep children away from that switch and the cars that might be there. This is the reason: If children could be warned away before trains were moved in and out, and thereby gotten out of the way of danger, then there was no need of the company fencing in their property; if they could avoid injury to the children by warning them away at any given time when trains were about to be moved there, then that was all that ordinary care required that they should do. So you cannot find any negligence, or cannot predicate negligence, a breach of duty,

on the fact that that particular property was not fenced in; but if the company did not fence it in, and it was not required to do so, in the exercise of ordinary care, that did not relieve it from the duty of exercising reasonable care, when its servants were going to move trains, to ascertain that children were not in a position where the movement of trains on that switch track would inflict injury upon them, and to give them warning, if children were there, in such a position that their presence would undoubtedly result in injury by the movement of the train—give them warning to get away, and thereby avoid it.

Now, then, the evidence in this case on the question of what care was taken by the railroad employees on this particular occasion is in this shape: As I gather, the defendant's evidence tends to prove that the rear brakeman on this train, as it was coming up the eastbound track, preparatory to going to the place where it could switch back on to the switch track, jumped off of the train at a point down on the switch track somewhere near where the evidence indicates that the little boy was found, after he was injured. That this brakeman crossed over the switch track in the opening between the various cars which were there, and then looked up and down to ascertain whether there was anyone in the vicinity or adjacent to those freight cars who would be injured if the train were moved any. He says that he saw no one, and then went ahead up to the place where the switching was to be made, threw the switch and again walked back and looked, and still he saw no one. The evidence of the boy, on the other hand, is that he and his little companion had been playing marbles in about the same spot for upwards of an hour before he was injured. Now, you would be justified, if you believe his testimony, in finding or inferring from it that either the brakeman did not look, as he testifies that he did, or that his looking was of such a cursory nature that he did not see these little

boys, who, they say, were playing out in the driveway, but very close to one of the freight cars. He was required to exercise the care of an ordinarily prudent person, the care that an ordinarily prudent person would exercise under the same circumstances, to ascertain whether or not children were in the vicinity of those cars and so close thereto that the movement of the cars might injure them. Now, it is for you to say, under the evidence, whether or not he did exercise the care of an ordinarily prudent person. Now, then, if this little boy was not in sight—was under the car when the brakeman looked—and you find that the brakeman looked as carefully as an ordinarily prudent person would look under those circumstances, you would be justified in finding no negligence on the part of the defendant, or any breach of duty; and, of course, in that event your verdict would be for the defendant. You could not say that the exercise of ordinary and prudent care required that this brakeman, when he came out on the south side of the switch track, should have looked underneath all of the cars to ascertain whether any people were under them, because he could not reasonably expect that children or others would be sojourning underneath the cars.

Now, then, it has been suggested in the case that possibly, at the time that the brakeman looked, this little boy was underneath the car, not hiding, but endeavoring to get this marble that he says was under there; but on that phase of the case, I merely want to call your attention to just these facts, not for the purpose of suggesting to you how your verdict should be, or how you should resolve those facts, but merely giving the facts to you, and letting you draw the inference from them that you will. The boy testifies that he had put his foot under there and was drawing the marble towards him, and had almost gotten it to the rail when the car moved and his foot was crushed. It would seem that if the boy's story is taken as correct,

and he reached the marble just as soon as he put his foot under there, that a very short period of time must have elapsed from the time that he put his foot under the car until his foot was crushed. Now, he says that prior to that time, that is when he put his foot under the car, he was playing marbles out in the driveway, but close up to the car. The brakeman testifies that almost six minutes were consumed from the time that he jumped off of the train to the time he went up and threw the switch. I think the conductor, it was, testified that there was nearly two minutes elapsed from the time he got the signal to move the train back before the back of the twenty cars which were attached to the engine came in contact with the five empty cars. Therefore there must have been some considerable period of time, comparatively speaking, between the time that the brakeman went through the cars and looked on the south side, until the time that the train actually came back in contact with the five cars that were there then with the two coal cars. Now, then, the significance of that is this: if the boy's story is correct, that he just put his foot under and moved the marble, and then the train hit him, it must have been a very short period of time after he put his foot under before the train started moving back; and, if his story is believed, all the time prior to that he must have been out in full view. Therefore he must have been out there, if you believe his story, at the time that the brakeman went through, unless it was he was actually hiding under the cars, or his story as to how long he was under there is not the true story. And, if you find that he was out there, you would be justified in finding that the brakeman did not look, or that his looking was not with the care that an ordinarily prudent person would have exercised under those circumstances, who was endeavoring to ascertain the presence of anyone there, so as to avoid injuring that person by the movement of the

train. Now, the question is for you to decide, and you will decide it on the evidence, without regard to sympathy, without regard to bias, but upon the evidence, purely and simply. Was there exercised on the part of the brakeman and those in control of the train, in the movement of the train at that particular time, the care that an ordinarily prudent person would have exercised under the same circumstances? If they did not exercise the care that the law required, that care which I have just mentioned, then the defendant may be liable, depending upon your decision of the next question. If they did exercise the care that the law required, or any of them exercised it, then that ends the case, and your verdict must be for the defendant. Now, the burden of establishing the facts from which you can find both the duty and the breach of duty rests upon the plaintiffs. They must establish, by the greater weight of the evidence, that the railroad company had reason to anticipate the presence of children there, and secondly, that the employees of the company, in the movement of the train in the way and manner I have described, did not exercise the care of a reasonably prudent person under the same circumstances. Now, I do not mean to say, when I use the words "greater weight of evidence," necessarily the number of the witnesses, but rather the persuasiveness of the evidence upon the whole. And if, in your consideration of the evidence you come to a point where you cannot say that the evidence on that phase or those phases of the case weighs heavier on one side than it does on the other, then the plaintiffs would not have borne the burden which the law casts upon them, and your verdict would be for the defendant.

Now, that brings us to the next question in the case. As the duty was, on the part of the railroad company, to exercise care to avoid injuring this little fellow, the boy, on his part, owed a duty to the railroad company, to exer-

cise care to avoid injury. Now, the care that an adult is required to exercise under ordinary conditions is that which an ordinarily prudent person would exercise under the same circumstances; but a boy, a child of tender years like this boy, is not required, of course, to exercise the same care that an adult is called upon to exercise, but he is only required to exercise the care that is usually exercised by children of similar age, judgment and experience. And, in determining whether this child was guilty of contributory negligence, that is to say negligence contributing proximately to his injury, you will have to take into consideration the age of the child, his experience and capacity to understand and avoid danger to which he was exposed, under the circumstances and situation as they existed at that particular time and place. Now, then, if you find that this little boy did not exercise the care which I have mentioned, that is to say the care which a boy of similar age, experience and judgment would exercise under the same situation, and you find that that lack of care contributed to the injury which he received, then your verdict would have to be for the defendant. If, on the other hand, you find that he did exercise the care that I have mentioned, or, in other words, that he did not fail to exercise the care which I have just mentioned, and you find that the railroad company failed in its duty to him, then your verdict will be for the plaintiffs.

Now, as the burden was upon the plaintiffs to show by the greater weight of the evidence, negligence on the part of the defendant, so the burden is on the defendant to show, by the greater weight of the evidence, negligence on the part of the plaintiff boy, which contributed to his injury. Now, on the question of—in determining whether or not the boy exercised the care which I have stated that the law requires that he should exercise, you must take into consideration, as I have said, not only his age, experience and

judgmnt, &c., under the circumstances, but also the facts in the case. Now, you will recall that the little boy testified that he did not go under that car, bodily under it, head foremost, because he was afraid that he might be crushed or injured. You will also bear in mind—I merely mention these things to you for suggestions, simply for the purpose of aiding you, and not to attempt to sway your judgment —he also testified that he put his foot under, because he felt that he could draw his foot out quickly. He says that he did not see any engine; he did not see any cars moving. Now, gentlemen, you have got to determine, fairly and without sympathy or without bias, whether or not, under the circumstances of this case, as detailed in the evidence from this witness, the child, whether that little boy, at the time in question exercised the care for his own safety which I have defined to you. If he did, and the plaintiff was negligent, then he is entitled to recover. If he did not, even though the plaintiff was negligent, he is not entitled to recover. Now, if you find, under these rules that I have given you, that the plaintiffs are entitled to recover, these are the rules which must govern you in the assessment of damages. The boy is entitled to be compensated, in so far as money can compensate, for the pain and suffering which he underwent as a result of the injury which he received and for any pain and suffering that he may undergo in the future. There is no eidence, I think, that he will undergo any pain and suffering as a result of this injury in the future. He is also entitled to be compensated for the loss of his limb, for the permanent physical impairment which resulted from his limb being run over by this train. Compensate him as best you can, using your judgment as reasonable men endeavoring to do justice under these circumstances. He is also entitled to be compensated for any loss of earning power in the future, which the loss of his leg may bring about. Of course, in that aspect of the case, you are dealing with uncertainties. No one can tell, with

any reasonable degree of certainty, what vocation this little boy might have taken up had it not been for the loss of his leg, or, for that matter, what he may take up now that he has one leg gone. It may have been that had he had the use of both legs, that his father's expressed desire that he should become a railroad engineer would have been fulfilled, and it may be that the loss of his leg will turn this boy off into another vocation whereby and wherein his emoluments and returns and pecuniary advantages will be far greater than those of a railroad engineer. But we are dealing in a realm of uncertainty. Nevertheless the fact that we are so dealing does not relieve you of the duty to reasonably try to assess what will be compensation to the boy for the loss and injury that he has sustained. Now, as to the father, he is entitled to receive whatever you find would be the pecuniary loss resulting to the father, not mental pain or anguish, but pecuniary loss resulting to the father from being deprived of the boy's earnings and services during his years of minority, that is to say until he had reached the age of 21 years. And you would also be entitled to assess to the father any moneys which he may have expended, or may expend in the future, in endeavoring to have the child cured of his injury. There is no evidence that any money has been spent up to the present time, and therefore you could not assess, as an element of damages, any moneys expended by the father in endeavoring, up to the present time, to have the child cured. However, it may be that before the child reaches the age of 21 years the father, as it is reasonable to presume, will provide for him an artificial leg. If he does so, then the father would be entitled to be compensated for the money which he would expend in that way. The only evidence in the case from which you could find what such a leg would cost is the evidence of the doctor that it would not exceed $100. Now, I think that I have covered all of the general fea-

tures of the case, that I feel it is necessary to bring to your attention, and I will just charge specifically, a few of the requests made by defendant's counsel which I think I have generally covered, but which, in order to be entirely certain, if defendant's counsel requests, I will charge in the language therein expressed.

Number 1 I think I have covered, Mr. Hobart, and there is no need of my charging it again. It will only tend to confusion.

Number 2, I charge in this language: "Plaintiffs are not entitled to recover unless the jury find that the defendant's servants backed the train into the siding without due lookout for, or warning to, persons in or about the cars standing on the siding.

Three: "Plaintiff, Edwin J. Hilt, Jr., cannot recover if the Jury find that he knew it was dangerous to be under cars or on the siding and did not exercise reasonable care at the time of the accident." I charge that, with this qualification, that the care required of him was that which would be usually exercised by children of similar age, judgment and experience under the same circumstances, and situations or those similar thereto.

Number 4: "If the jury find that the plaintiff Edwin J. Hilt, Jr., was negligent, and his negligence contributed to his injury, then the plaintiff Edwin J. Hilt, Sr., cannot recover." I have already, I think, charged that.

Number 5: "The mere fact that at times children played on or about the siding is not sufficient to justify the jury in finding that the defendant customarily permitted them to play there." In fact I will charge stronger than that. The evidence is that they were driven away, and if they were driven away, you could not find a permission for them to stay there. But the fact that they congregated there, even though they were driven away, if the fact that they were congregating there and were in the habit of doing so, was such as to cause the railroad em-

ployees or the company to anticipate their presence there, did not relieve the company of the duty of exercising reasonable care to see that none of them who did congregate there were injured by the movement of the trains on that siding. Plaintiff may take his exceptions.

Mr. Greenstone—No exceptions.

Mr. Hobart—Your Honor please, on behalf of the defendant, I respectfully ask that exceptions may be noted as follows:

First, to that part of your Honor's charge near the end thereof, where, in discussing the father's claim, you stated to the jury that the father would be entitled to recover for loss of services, &c., medical expenses, but without qualifying it by saying that there should be deducted therefrom whatever expense he would reasonably be put to in the maintenance and education of the boy during that period of minority.

The Court—Well, Mr. Hobart, would that apply in a case like this Of course it applies in a death case, but he would have to have the boy educated, and is there any deduction in a case of this kind?

Mr. Hobart—I think there is, sir.

The Court—Well, just tell me where it is, because if I can see it. I will be ver yglad to qualify my charge.

Mr. Hobart—Well, my idea simply is that the father is under the legal duty to maintain the boy and educate him, certainly to maintain, if not to educate him, and that being so, the necessary cost, or the reasonable cost of so doing, would be a set-off against what the boy might be able to earn during the period of minority.

The Court—Well, I will charge the jury this: in so far as you assess the father's damages for loss of services, you would only be permitted to allow him such excess in the way of money, over and above what it would cost him as a father to educate, clothe and care for the child, and the pecuniary loss could only be that which was due to the loss of the leg. He has not lost the son entirely.

Mr. Hobart—I think that meets the point, your Honor. Then I also ask an exception to that part of your Honor's charge where you stated that there was no evidence of any negligence on the part of the father, that is so far as it would affect the right of the father to recover. My idea being, that of course while there was no evidence that the father knew the boy was going to this place at this particular time, nevertheless there is evidence to show that the father hadn't warned the boy to keep away from the railroad cars. I think that is some evidence that—

The Court—I think you are right about that. I will qualify my charge regarding the question of negligence on the part of the father. There is evidence to the effect that the father had not warned the boy to keep away from the railroad track, and if you find that the exercise of the care which the law required of a father, to warn his son to imminent and impending dangers, was neglected by the father, and that that proximately contributed to the boy's injury, then the father could not recover. Does that make it clear enough?

Mr. Hobart—Yes, I think that covers the point entirely. Then I also ask an exception to that part of your Honor's charge where you stated that the legal rule for the jury to consider in this case was whether or not the defendant or its servants had exhibited reasonable care.

The Court—Yes; your point is that they are only liable for wilful and wanton injury?

Mr. Hobart—Yes, sir.

Exception allowed and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

Mr. Hobart—I also ask an exception to that part of your Honor's charge where you stated in substance that if the jury believe the boy's testimony, that they would be justified in finding that the brakeman did not look or that his looking was cursory; and in that same connection,

where your Honor stated that if they believe the boy's testimony, that then the boy must have been in the roadway when the brakeman passed through the opening in the cars, in discussing the evidence on that subject.

Exception allowed and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

Mr. Greenstone—In regard to Mr. Hobart's request to charge as to the father's warning the child about this—

The Court—You want an exception there to the part that I last charged?

Mr. Greenstone—Why, no, only this, that the jury remember the facts as to the particular testimony given by the father that he had warned him as against cars and other things too.

The Court—The jury are presumed to remember the facts and I will have to leave it to them. I simply stated that there was evidence that the father had not warned him, and that evidence was the boy's evidence. He said his father had told him to keep away from automobiles, bicycles and things of that sort, and I think the boy said his father had not told him to keep away from trains, but my recollection is there was evidence of the father, that he had told him to keep away from the trains, generally, but whether there was or not I do not remember.

A Juror—The jury have asked me to ask your Honor if the jury finds a verdict for the plaintiff, can that money be put in trust otherwise than the father?

The Court—Well, the law takes care of that. You must find two verdicts, gentlemen. I don't know whether I made that clear to you, one for the son and one for the father. That is, I don't mean that: that is inartistically expressed. You must find two verdicts, one in the case of the father, either for or against him; one in the case of the son, either for or against the son.

Defendant's counsel asks an exception to the refusal of

the Court to charge request No. 1 in the exact language of the request. Said request reads as follows:

"Defendant was under no legal duty to build or maintain a fence at the place where the accident occurred, and no verdict can be rendered against defendant merely because there was no fence at that place."

Exception allowed and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

Defendant's counsel asks an exception to the refusal of the Court to charge request No. 5 in the exact language of the request. Said request reads as follows:

"The mere fact that at times children played on or about the siding, is not sufficient to justify the jury in finding that the defendant customarily permitted them to play there."

Exception allowed and sealed accordingly.

THOMAS G. HAIGHT. [L. S.]

The Jury retire.

Rule to Show Cause.

(*Filed June 29, 1917.*)

On due application on behalf of defendant, ordered that the plaintiffs in above entitled suit show cause before this Court on Monday, the 23d day of July, 1917, at ten o'clock in the forenoon, at the Post Office Building in the City of Newark, N. J., why the verdicts rendered in their favor respectively on June 29, 1917, should not be set aside and a new trial granted. The defendant shall serve a copy of its reasons and state of the case on or before July 16th, 1917.

THOMAS G. HAIGHT,
Judge.

Dated June 29, 1917.

Reasons.

(*Filed July 16, 1917.*)

The defendant assigns the following reasons in support of the rule to show cause herein:

1. The verdicts of the jury were excessive.

2. Said verdicts were against the clear weight of the evidence.

3. There was error in charging the jury that they would be justified, if they believed the testimony by the plaintiff, Edwin J. Hilt, Jr., in finding or inferring from it, either that the brakeman did not look, or that his looking was of such a cursory nature that he did not see the boys.

4. There was error in charging the jury that, if the story by the plaintiff, Edwin J. Hilt, Jr., that he put his foot under the car and moved the marble and then the train hit him, was correct, it must have been a very short period of time after he put his foot under before the train started moving back, and, if his story was believed, all the time prior to that he must have been out in full view; and that he must have been out in the driveway at the time the brakeman went through.

COLLINS & CORBIN,
Attorneys of Defendant.

Opinion.

(*Filed July 28, 1917.*)

On rule to show cause why verdict of the jury should not be set aside.

SAMUEL GREENSTONE (EDWIN F. SMITH), for the plaintiff; HON. GILBERT COLLINS, for the defendant.

HAIGHT, District Judge (orally, at the conclusion of the argument): I feel that the verdict in this case is clearly excessive, if the New Jersey cases are, in any respect, taken as a standard. I do not feel at liberty to entirely disregard them as such a standard, nor do I feel absolutely bound by them in cases such as this, where there has been a loss of a limb or other injury of a like character which involves pain and suffering, and where the damages are not subject to mathematical computation with any degree of certainty. In two cases, namely *Baker* vs. *The Public Service Railway Company*, reported in 79 *N. J. Law* 249, and *McDermott* vs. *Public Service Corporation of New Jersey* (decided in 1909 but not reported), verdicts of $8,000 and $8,500, respectively, for the loss of the leg of a child, one six years of age and the other three and one-half years of age, were held excessive. It does not appear, from the report in the Baker case, where the amputation took place, that is to say, whether it was above or below the knee. It does appear, however, in the McDermott case that the amputation was below the knee. I can readily appreciate that the place of amputation, in respect to the knee, should make some difference in the amount of damages to be awarded, because of the inconvenience, to express it mildly, that a person so injured would suffer in after years. It is an absolutely impossible thing to determine with any degree of certainty what should be allowed one for the loss of a limb. Such a loss entails in after years the deprivation of all of the uses to which a limb can be put, and necessarily all of the enjoyments which go with the free, full and uninterrupted use of what nature has provided human beings with. However, as the courts, for many years, have undertaken to control verdicts in such cases, I must not disregard the duty to do so when it appears to me that the verdict is so greatly in excess of what have been considered proper verdicts for similar in-

juries in courts of co-ordinate jurisdiction in this State. I appreciate that in a number of jurisdictions verdicts for fully as large amounts as that rendered in this case have been sustained as not excessive, but the verdicts in New Jersey, as I have before stated, have been held within smaller bounds. It must be borne in mind, as far as the pecuniary loss to this boy is concerned, that the money which is now awarded to him will, theoretically, be his, without impairment, when he reaches twenty-one years of age, and that during all of that time the fund will have been accumulating, at compound interest. Hence, whatever sum is awarded to the boy at this time will be very greatly increased, if not practically doubled, by the time he reaches twenty-one years of age. I do not think, either, that we can entirely close our eyes to the fact that the fact that this little boy has lost his leg may result in his receiving a better education than he would otherwise have received, and thereby eventually procure for him in after years a means of livelihood which will be more lucrative than that which, according to his father's testimony, and as we may readily believe, he would have followed had it not been for the injury. In giving him such an education, however, resort will doubtless be made to the income of the money which is awarded him in this case, because it is quite evident that his father, who seems to be in poor financial circumstances, will not be able to supply the money necessary therefor. But in so far as the verdict seeks to compensate him for the loss of the limb, quite irrespective of the pecuniary loss resulting to him in the impairment of earning power from being deprived of the limb, it is impossible for us to attempt to figure, with any degree of accuracy, what it should be, and the same applies to the pain and suffering. I feel that the amount of the verdict was not the result of sympathy and bias so much as it was the result of a circumstance which was quite independent of

the trial of this case or anything occurring therein. I refer to the trial of the case immediately preceding, where a very large verdict was undoubtedly influenced by a similar verdict in the same case given by one of the courts of New York, where it is a matter of common knowledge that verdicts for personal injuries are much larger than they are in this State. Unless, therefore, the plaintiff consents to a reduction of the verdict to the sum which I am going to presently mention, I will have to set aside the verdict as excessive and grant a new trial.

The question of contributory negligence, I think, was one peculiarly for the jury, and I cannot say that their verdict was contrary to the evidence, or, rather, that the inference that they drew from the uncontradicted facts in the case—that the boy exercised the care that a boy of his age and experience would have exercised under similar conditions—was improper. True it is that the boy appreciated that the act of going under the car or putting his leg under it was fraught with danger, but that mere fact does not, as I understand the rule, dispose of a case of contributory negligence where children of tender years are concerned. I think that there must also enter into the determination of that question the inquiry whether or not the child, although appreciating the danger, acted as a child of his age and intelligence would have acted under the same circumstances, either in failing to avoid the danger, or in attempting to lessen its effects. This boy was scarcely over 6 years of age at the time of the accident; he was doing what thousands and thousands of boys of similar age do, taking chances, without a due appreciation of either the possibility of injury or that the method which they are taking to avoid it is sufficient and proper for that purpose. It may be that having been under seven years of age, the rule in this circuit is that he could not be guilty of contributory negligence (*Erie Railroad Company* vs. *Swiderski*, 197 *Fed.* 521). In

that case the child was between 7 and 8 years of age, and I think it may be a fair inference from the opinion and decision that the Court meant to hold possibly that a child under seven years of age or thereabouts could not be guilty of contributory negligence. However, I did not attempt to charge the jury that the child could not be guilty of contributory negligence, nor do I think that I would be justified in doing so until there is a more clear expression on the part of the Circuit Court of Appeals on that point, in view of the decision of the New Jersey Courts in *Baker* vs. *Public Service Railway* (*supra*) and *David* vs. *West Jersey and Seashore*, 84 *N. J. Law* 685.

As to whether or not the verdict was against the weight of evidence on the question of negligence, I think that it was a fair jury question, and that I would not be justified under any circumstances in disturbing the verdict of the jury in that respect. I do not mean by this to infer, even if I had been sitting on the jury, how I would have found the facts on this phase of the case. On this point, the question was whether or not the brakeman had either looked to ascertain whether or not the child was in the vicinity of the car before giving the signal to back the train, or, if he had looked, whether his looking was sufficiently careful. His testimony was clearly to the effect that he did so; that he looked in a careful and prudent manner. The testimony of the boy, on the other hand, if believed by the jury, clearly permitted the inference that the brakeman did not so look. I think that this question was presented to the jury clearly and properly.

I do not think that there is any need of my reiterating the testimony on this point, and the reasons for my general conclusion as to this being a jury question. I think that they are fully set forth in the reasons which I gave for denying the motion for a direction of verdict and in the charge.

Although the verdict is very excessive, when judged by the standards that I have mentioned heretofore, I am not prepared to say that it is so excessive—so out of all reason—as to indicate that the jury were, on the other questions in the case, influenced by sympathy or passion, and not by a calm consideration of the evidence, because men may readily differ upon what should be fair compensation for an injury such as this, and widely differ and honestly so. The jury did not have the benefit of the general run of the decisions of the Courts of New Jersey on what constitutes excessive damages for an injury to a child such as this. I think that, under all of the circumstances of the case, bearing in mind the considerations which I have mentioned heretofore, the fact that the boy's leg was amputated above the knee, that a verdict of $10,000 would have been in harmony, or, at least, such harmony with the trend of the New Jersey decisions, as not to have been excessive or improper. If, therefore, the plaintiff will remit from his verdict the sum of $15,000 in the boy's case, the rule to show cause will be denied, otherwise it will be made absolute. If it is made absolute, it carries with it the verdict rendered for the father, which will also be set aside. If, however, the reduction is accepted, and the remittitur made, the latter will not be disturbed, as I cannot find that it is excessive. The order entered in accordance with these conclusions shall provide that the plaintiff must elect within ten days from the date thereof.

Rule Absolute.

(*Filed August 1, 1917.*)

This cause being regularly on the list for trial at the April Term, 1917, of this court, and being called, and both parties appearing, and the cause being moved by the plain-

tiff, and a jury empaneled and sworn, and the evidence offered by the parties submitted, and the respective parties by their counsel being heard, and the Court having charged the jury, and the jury having retired to consider their verdict, come again into court, and say that the said defendant is guilty of the premises within laid to its charge, in manner and form as the said plaintiff hath within complained against it; and they assess the damages of the said plaintiff Edwin Hilt, Jr., at the sum of $25,000 and of the plaintiff Edwin Hilt, Sr., at the sum of $1,500; and the Court having heard a motion why a new trial should not be granted, and having considered the same, and having concluded that judgment should be entered for the plaintiff Edwin J. Hilt, Jr., i nthe sum of $10,000, and for the plaintiff Edwin J. Hilt, Sr., in the sum of $1,500, provided the plaintiff Edwin J. Hilt, Jr., by his next friend, is willing to reduce the verdict to that amount, or that the rule to show cause should be made absolute and a new trial granted as to both plaintiffs, it is thereupon on this 1st day of August, 1917,

Ordered that the plaintiff Edwin J. Hilt, Jr., by his next friend, remit from his verdict the sum of $15,000 within ten days from the date hereof, or that the rule to show cause be made absolute and a new trial granted.

THOMAS G. HAIGHT,
Judge.

Consent.

(*Filed August 7, 1917.*)

The above entitled matter having come on for trial at the April Term of this Court, and the cases having been tried, and the jury having found for the plaintiffs, and assessed

the damages of the plaintiff Edwin J. Hilt, Jr., at the sum of twenty-five thousand dollars ($25,000.00), and of the plaintiff Edwin J. Hilt, Sr., at the sum of fifteen hundred dollars ($1,500.00), and a rule to show cause why a new trial should not be granted, having been obtained by the defendant, and the same having been argued, and the Court being of the opinion that the said verdict in favor of Edwin J. Hilt, Jr., is excessive, and having, on August 1st, 1917, ordered that the plaintiff Edwin J. Hilt, Jr., by his next friend, remit from his verdict the sum of fifteen thousand dollars ($15,000.00) within ten days from the date thereof, or that the rule to show cause be made absolute, and a new trial granted, the said Edwin J. Hilt, Jr., by Samuel Greenstone, his attorney of record, does hereby remit from said verdict so rendered in his favor the sum of $15,000.00, so that the same should stand at the sum of $10,000.00.

Dated Jersey City, August 6th, 1917.

SAMUEL GREENSTONE,
Atty. for Plaintiff, Edwin J. Hilt, Jr.

Rule for Final Judgment.

(*Filed August 10, 1917.*)

It appearing by the record in the above-entitled cause that the plaintiff, Edwin J. Hilt, Jr., by next friend, has remitted from the verdict of the jury the sum of $15,000 as required by the order of this Court, it is, on this 10th day of August, 1917,

Ordered that judgment final be entered against said defendant and in favor of the plaintiff, Edwin J. Hilt, Jr., by next friend, for the sum of $10,000, and in favor of the plaintiff, Edwin J. Hilt, Sr., for the sum of $1,500,

besides costs of suit to be taxed, and that execution issue, etc.

On motion of
SAMUEL GREENSTONE,
Attorney of Plaintiffs.

Let this rule be entered in the minutes of the Court.
THOMAS G. HAIGHT,
Judge.

Assignments of Error.

(*Filed August 28, 1917.*)

Comes now the plaintiff in error, Erie Railroad Company, a corporation, and files the following assignments of error upon which it will rely in its prosecution of the writ of error in this action:

1. The United States District Court for the District of New Jersey erred in admitting the following question asked by counsel of the plaintiffs of the plaintiff, Edwin J. Hilt, Sr.:

> "Q. 49. Mr. Hilt, what did you expect to bring up your boy to, what profession or trade?"

2. Said Court erred in refusing to strike out testimony by the witness Joseph Simoldini, as follows:

> "A. I tell you, sometimes they would switch in O. K., sometimes they would switch in making the car go up against the bumper and loosen up the bumper or ties, whatever you call it."

3. Said Court erred in admitting the following question asked by counsel of the plaintiffs of one Frank Vitale, a witness called on behalf of plaintiffs:

> "Q. 4. During that period of time have you seen children playing there?

4. Said Court erred in admitting the following questions asked by counsel of the plaintiffs of one Frank Vitale, a witness called on behalf of plaintiffs:

"Q. 96. (a) Well, how many detectives did they have there?

"Q. 97. (b) Before April 5, 1916?"

5. Said Court erred in admitting the following questions asked by counsel of the plaintiffs of one Frank Vitale, a witness called on behalf of plaintiffs:

"Q. 99. (a) How long before that day did they have more than one?

"Q. 101. (b) How many did they have then?"

6. Said Court erred in denying the motion in behalf of defendant that the jury be directed to return a verdict for the defendant on the following grounds, or one or more of them:

First: Because there was no evidence of any negligence on the part of defendant or of its servants or agents.

Second: Because the accident to the plaintiff, Edwin J. Hilt, Jr., was due to his contributory negligence.

Third: Because the plaintiff, Edwin J. Hilt, Jr., was a trespasser on the property of defendant, and the defendant did not violate its legal duty to said plaintiff as such trespasser.

Fourth: Because the accident was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr., in walking, standing or playing on defendant's railroad.

Fifth: Because the accident was due to contributory negligence on the part of the plaintiff, Edwin J. Hilt, Jr., in failing to take reasonable care to look, listen or otherwise inform himself of the approach of the train.

Sixth: Because the plaintiff, Edwin J. Hilt, Jr., was injured by an engine or car while walking, standing or playing on a railroad in violation of Section 55 of the act entitled "An act concerning railroads (Revision of 1903)," approved April 14, 1903.

7. Said Court erred in giving the following instructions during the course of the charge to the jury:

"Now, then, if they anticipated that children would be playing in and about those cars, there arose on their part a duty, so far as the children of tender and immature years were concerned, to exercise ordinary and reasonable care to avoid injury. What might be reasonable care under one set of circumstances might not be reasonable care under another, and I am going to discuss that with you in just a moment. Now, if this boy had been a person of older years and mature judgment, if he had been an adult, then there would not have arisen on the part of the railroad company the duty to exercise ordinary and reasonable care to protect him, because under those circumstances he would have been a trespasser on the property of the railroad company, and the duty which the railroad company would have owed him then would have been only the duty to refrain from acts wantonly and wilfully injurious. Now, you can readily see that if this boy had been an adult, under that rule, there would have been no liability in this case, because there is no evidence whatsoever to show that any employee of the company wantonly or wilfully did anything to injure this boy. But the boy, being of immature years and judgment and experience—being, I think, at the time of the accident six years and five to six months of age—the railroad company owed to him a different duty, providing that they had reason to anticipate that he was likely to be there, and that was to exercise ordinary and reasonable care to see that he was not injured."

8. Said Court erred in giving the following instructions during the course of the charge to the jury:

"But in this case there is evidence tending to prove, and as I state I think it is uncontradicted, that the frequency with which children went there was such that the railroad employees anticipated the presence of children at this point. Now, having defined what the duty was, namely, to exercise ordinary and reasonable care to see that those children were not injured by the movements of the trains to and fro, etc., you must find in the case, in the first instance, facts from which you can say that that duty arose, namely, that the railroad company and its employees had reason to anticipate that children would be there. If you find that fact, then the duty, as a matter of law, arises, and if you find that a duty existed, the next question is, Was there a breach of that duty? Did they fail—did the company or its employees fail—to exercise ordinary and reasonable care to avoid injuring children playing there."

9. Said Court erred in giving the following instructions during the course of the charge to the jury:

"The evidence of the boy, on the other hand, is that he and his little companion had been playing marbles in about the same spot for upwards of an hour, before he was injured. Now, you would be justified, if you believe his testimony, in finding or inferring from it, that either the brakeman did not look, as he testifies that he did, or that his looking was of such a cursory nature that he did not see these little boys who, they say, were playing out in the driveway, but very close to one of the freight cars."

10. Said Court erred in giving the following instructions during the course of the charge to the jury:

"Now, then, it has been suggested in the case that possibly, at the time that the brakeman looked,

this little boy was underneath the car, not hiding, but endeavoring to get this marble that he says was under there; but on that phase of the case, I merely want to call your attention to just these facts, not for the purpose of suggesting to you how your verdict should be, or how you should resolve those facts, but merely giving the facts to you, and letting you draw the inference from them that you will. The boy testifies that he had put his foot under there and was drawing the marble towards him, and had almost gotten it to the rail when the car moved and his foot was crushed. It would seem that if the boy's story is taken as correct, and he reached the marble just as soon as he put his foot under there, that a very short period of time must have elapsed from the time that he put his foot under the car until his foot was crushed. Now, he says that prior to that time, that is when he put his foot under the car, he was playing marbles out in the driveway, but close up to the car. The brakeman testified that almost six mniutes were consumed from the time that he jumped off of the train to the time he went up and threw the switch. I think the conductor, it was, testified that there was merely two minutes elapsed from the time he got the signal to move the train back before the back of the twenty cars which were attached to the engine came in contact with the five empty cars. Therefore there must have been some considerable period of time, comparatively speaking, between the time that the brakeman went through the cars and looked on the south side, until the time that the train actually came back in contact with the five cars that were there, then with the two coal cars. Now, then, the significance of that is this: if the boy's story is correct, that he just put his foot under and

moved the marble, and then the train hit him, it must have been a very short period of time after he put his foot under before the train started moving back; and, if his story is believed, all the time prior to that he must have been out in full view. Therefore he must have been out there, if you believe his story, at the time that the brakeman went through, unless it was he was actually hiding under the cars, or his story as to how long he was under there is not the true story. And, if you find that he was out there, you would be justified in finding that the brakeman did not look, or that his looking was not with the care that an ordinarily prudent person would have exercised under those circumstances, who was endeavoring to ascertain the presence of anyone there, so as to avoid injuring that person by the movement of the train."

11. Said Court erred in refusing to give the following instructions during the course of the charge to the jury:

"Defendant was under no legal duty to build or maintain a fence at the place where the accident occurred, and no verdict can be rendered against defendant merely because there was no fence at that place."

12. Said Court erred in refusing to give the following instructions during the course of the charge to the jury:

"The mere fact that at times children played on or about the siding, is not sufficient to justify the jury in finding that the defendant customarily permitted them to play there."

Wherefore, the said Erie Railroad Company, plaintiffs in error, prays that the judgment of the District Court of the United States for the District of New Jersey may be reversed and that the said District Court may be directed to grant a new trial of said cause.

COLLINS & CORBIN,
Attorneys of Plaintiff in Error.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1918.

No. 2308 (List No. 56).

ERIE RAILROAD COMPANY, Plaintiff in Error,

vs.

EDWIN J. HILT, Jr., Defendant in Error.

And afterwards, to wit, on the 7th day of December, 1917, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson, and Hon. Victor B. Woolley, Circuit Judges, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 5th day of January, 1918, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1917.

No. 2308.

ERIE RAILROAD COMPANY

vs.

EDWIN J. HILT, Jr., et al., Plaintiffs Below.

Error to the District Court of the United States for the District of New Jersey.

Before Buffington, McPherson, and Woolley, Circuit Judges.

MCPHERSON, *Circuit Judge:*

A branch of the defendant's railroad runs through the town of Garfield, New Jersey. On April 6, 1916, Edwin J. Hilt, Jr., one of the plaintiffs, a boy less than 7 years old, was run over and severely hurt on a switch track or siding near the station, and this suit is brought by his father and himself to recover damages for the injury.

At the place of the accident, there are 2 main tracks and a siding; trains run toward Jersey City on the eastbound track, and south of this track is the siding which runs westward to the station and is used for the receipt and delivery of freight. On the day in question, 9 cars stood on the siding, first, 5 empty cars near its junction with the eastbound track; then 2 loaded coal cars, separated from the empty cars by an open space of 15 or 20 feet, the remaining 2 being

loaded box cars standing near the station and separated from the coal cars by a space of similar width. Immediately south of the siding there was open ground about 20 feet wide and more than 350 feet long. This was chiefly used as a driveway to the station and the siding, but for a good many years it had been also used as a playground by children, some of them very young, who were accustomed to play on the open ground, on the siding itself, and over and about the cars that might be standing on the rails. This was a frequent practice, and was well known to the servants of the railroad. Sometimes the children would be driven or ordered away, but this had little effect on the practice, as there was no barrier to keep them off.

On April 6 a train consisting of an engine and 20 cars was moving toward Jersey City on the eastbound track. It had been ordered to pick up the 5 empty cars, and as the train neared the junction of the siding with the eastbound track, the rear brakeman alighted from a car toward the rear of the train for the purpose of setting the switch. He descended on the southerly side of the train, between the eastbound track and the siding, and crossed the siding thru the space between the coal cars and the empty cars, thus reaching the driveway. He testified that he looked up and down both rails of the siding, but saw no one. Thereupon he ran east and turned the switch, the train meanwhile having moved east and stopped at a point where its rear end was about 50 feet beyond the switch. The brakeman then gave the signal to back and ran west along the north rail of the siding to the place where the empty cars were to be coupled. As he ran he could see along the northerly side of the siding as far as its western end, but still saw no one. He ran as far as the middle of the empty cars, and waited to make the coupling. These movements required about 6 or 7 minutes, and the engineer, obeying the signals, backed into the siding against the empty cars. When the train started to back, the conductor testified that he was on top of a car about the middle of the train, was facing west, and was watching the siding and the brakeman, but saw no one except the brakeman. The train was moving about 4 or 5 miles an hour, and stopped on the usual signal, and in the usual way; the coupling was made, but the momentum of the train pushed back the empty cars against the coal cars and moved these 7 cars a few feet further. The 2 loaded box cars were not disturbed.

The boy had been playing marbles near the siding with a companion of his own age, who was not called as a witness. A peddler who was selling potatoes at a house in the neighborhood saw the boys near the siding about 5 minutes before the accident and told them to get away or they would be hurt, but he paid no further attention to the matter until he heard the coupling of cars and the cries of the injured boy just afterward, whereupon he hastened to the spot and found the boy lying on the ground close to the rail on the south side of the siding, and close to the train, which was then standing still. The boy testified that he had been playing marbles for an hour before the accident, and that a marble had rolled under one of the 5 empty cars and was lying toward the north rail of the siding. He tried to recover it by reaching under the car with his foot and pulling the marble toward him, but drew back quickly because he thought the

cars might be going to move. He tried a second time, however, and while he was thus engaged the train backed in and his left leg was so badly injured that amputation was necessary. At the trial no question was raised about the duty of the train to give notice of its movements by bell or whistle; the plaintiffs' position was that the railroad's testimony, already referred to, could not be accepted, that the boy must have been visible, and that the brakeman was negligent in failing to see him and in failing to give him notice of the danger. Witnesses testified that both boys were seen at the spot immediately after the accident.

On the question of the railroad's negligence, it is clear that the jury was the proper tribunal to decide which account was the most reliable, and what inferences should be drawn from the testimony after the facts were determined. Under the charge they must have found that the brakeman did not exercise reasonable care, and we think the conflicting evidence justified the court in submitting this question.

Whether, considering his tender years, the boy was to be chargeable with contributory negligence as a matter of law, either as a general proposition or under sec. 55 of the N. J. statute (3 Comp. Stat. p. 4245) is not an open question in this court. No decision of the highest court of the state requires us to hold that the district court should have taken this question from the jury, and our own cases (Snare & Triest Co. vs. Friedman, 169 Fed. 1, Erie R. R. v. Swiderski, 197 Fed. 521, Chesko v. Del. & Hud. Co., 218 Fed. 804) are to the contrary. The boy's contributory negligence was submitted to the jury as a question of fact, and this was all the defendant could properly ask. Upon this point there was pertinent testimony by the boy that he had never played on the siding or around the cars before, and had never been in the driveway or near the siding; that he had never seen cars going up and down the siding and knew nothing about the movement of cars thereon; that on the day in question he saw no railroad men, no engine or train, and did not know that switching was being done or that cars were to be moved. He testified that he knew he would be hurt if a car ran over him, and gave some other answers that were in the railroad's favor; but the whole subject was for the jury and was submitted under proper instructions.

The father's contributory negligence was also submitted in language to which no exception was taken.

No other assignment of error seems to need consideration, and accordingly the judgment is affirmed.

Endorsed: No. 2308. Opinion of the Court, by McPherson, J. Received & filed Jan. 5, 1918. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1917.

No. 2308 (List No. 56).

ERIE RAILROAD COMPANY, Plaintiff in Error,

vs.

EDWIN J. HILT, Jr., Defendant in Error.

In Error to the District Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

Philadelphia, January 5, 1918.

Endorsed: No. 2308. Order Affirming Judgment Received and filed Jan. 5, 1918. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania.
Third Judicial Circuit, ss:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Erie Railroad Company, Plaintiff in Error, vs. Edwin J. Hilt, Jr., Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-sixth day of January in the year of our Lord one thousand nine hundred and eighteen and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Erie Railroad Company is plaintiff in error, and Edwin J. Hilt, Jr., an infant, by his next friend, and Edwin J. Hilt, Sr., are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of New Jersey, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of March, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26313. Supreme Court of the United States, No. 846, October Term, 1917. Erie Railroad Company vs. Edwin J. Hilt, Jr., etc., et al. Writ of Certiorari.

United States Circuit Court of Appeals for the Third Circuit.

No. 2308.

ERIE RAILROAD COMPANY, Petitioner,

vs.

EDWIN J. HILT, Jr., an Infant, by His Next Friend, EDWIN J. HILT, Sr., Defendants in Error.

Stipulation as to Return of Transcript of Record under Writ of Certiorari.

It is hereby stipulated and agreed between the attorneys for the respective parties above named that the transcript of record now on file in the Clerk's office of the Supreme Court of the United States shall stand and be accepted and considered as the transcript of record to be returned to that Court by the Clerk of the Circuit Court of Appeals for the Third Circuit under the writ of certiorari issued March 11, 1918.

GEO. S. BECKETT,
Attorney for Plaintiff in Error.
EDWIN F. SMITH,
Attorney for Defendants in Error.

Endorsed: No. 2308. Stipulation of Counsel for Return to Writ of Certiorari. Received & filed Mar. 22, 1918. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel for return to writ of certiorari, in the case of Erie Railroad Company, Plaintiff in Error, vs. Edwin J. Hilt, Jr., an infant, by his next friend, Edwin J. Hilt, Sr., Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-second day of March in the year of our Lord one thousand nine hundred and eighteen and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court
of Appeals, Third Circuit.

[Endorsed:] File No. 26313. Supreme Court U. S., October term, 1917. Term No. 846. Erie Railroad Co., Petitioner, vs. Edwin J. Hilt, Jr., etc., et al. Writ of certiorari and return. Filed March 26, 1918.

No. 846

FEB 8 1918

JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1917.

No.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

EDWIN J. HILT, JR., BY NEXT FRIEND, AND
EDWIN J. HILT, SR., RESPONDENTS.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

GEO. S. HOBART,
Attorney for Petitioner.

Arthur W. Orum, Law Printer, 824 Market Street, Wilmington, Del.

Supreme Court of the United States.

OCTOBER TERM, 1917.

Erie Railroad Company, Petitioner,

vs.

Edwin J. Hilt, Jr., by next friend, et al., Respondents.

Notice of Motion.

To Samuel Greenstone, Esq., Attorney for Respondents, and Edwin F. Smith, Esq., of Counsel for Respondents:

Please take notice, that the petition for writ of certiorari of which notice was served upon you on the 24th day of January, 1918, to be heard before this Court at Washington, on Monday, the 11th day of February, 1918, will be continued until Monday, the 4th day of March, 1918, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Yours respectfully,

GEO. S. HOBART,
Attorney for Petitioner,
243 Washington Street,
Jersey City, N. J.

Dated February 1, 1918.

Service is hereby admitted of the above nctice this 2d day of February, 1918.

EDWIN F. SMITH,
Of Counsel for Respondents.

Supreme Court of the United States

OCTOBER TERM, 1917.

ERIE RAILROAD COMPANY, *Petitioner,* *vs.* EDWIN J. HILT, JR., by next friend, and EDWIN J. HILT, SR., *Respondents.*	*Notice of Motion.*

TO SAMUEL GREENSTONE, Esq., attorney for respondents, and EDWIN F. SMITH, Esq., of counsel for respondents.

TAKE NOTICE that upon a certified copy of the transcript of the record herein, and upon the annexed petition of Erie Railroad Company, petitioner, and upon the brief attached hereto, the undersigned, on behalf of the said petitioner, will present the annexed petition for writ of certiorari to the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on Monday, the eleventh day of February, 1918, at the opening of the Court on that day, or as soon thereafter as counsel can be heard,

and will ask for such other and further relief in the premises as may seem just.

Yours respectfully,

GEO. S. HOBART,
Attorney for Petitioner,
243 Washington street, Jersey City, N. J.

Due and sufficient notice of the submission of the annexed petition is hereby admitted this 24th day of January, 1918.

EDWIN F. SMITH,
Of Counsel for Respondents.

Supreme Court of the United States

OCTOBER TERM, 1917.

ERIE RAILROAD COMPANY, *Petitioner,* *vs.* EDWIN J. HILT, JR., by next friend, and EDWIN J. HILT SR., *Respondents.*	*Petition for Writ of Certiorari to the U. S. Circuit Court of Appeals for the Third Circuit.*

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, ERIE RAILROAD COMPANY, respectfully shows:

1. Your petitioner is a corporation of the State of New York and was the defendant below in the above entitled action and the plaintiff in error in the United States Circuit Court of Appeals on writ of error taken to review a judgment entered against it in the United States District Court for the District of New Jersey.

2. This suit was commenced in the United States District Court for the District of New Jersey by summons dated November 20, 1916, to recover damages for personal injuries sustained by the plaintiff, Edwin J. Hilt, Jr., by reason of personal injuries sustained by him on account of being run over by a freight car

operated by your petitioner at Garfield, in the State of New Jersey, on April 6, 1916; and by Edwin J. Hilt, Sr. (father of Hilt, Jr.), to recover damages for the medical expenses and the loss of services of his son during the latter's minority; the two plaintiffs uniting in the action by virtue of one of the provisions of the "Practice Act of 1912" of the State of New Jersey (Ch. 231, P. L. 1912, p. 377, sec. 4).

3. At the trial of the case a verdict was rendered by the jury for the sum of $25,000 in favor of Hilt, Jr., and for the sum of $1,500 in favor of Hilt, Sr. On rule to show cause the Trial Court ordered that a new trial be granted as to Hilt, Jr., unless all in excess of the sum of $10,000 was remitted. Consent to the reduction of the verdict on that case to that amount was thereafter filed, and judgment was duly entered for said sum of $10,000 in favor of Hilt, Jr., and for the sum of $1,500 in favor of Hilt, Sr.

4. Thereafter, on September 4, 1917, an order was made by the United States District Court for the District of New Jersey, allowing a writ of error to the United States Circuit Court of Appeals for the Third Circuit. The same thereafter came on to be heard before said United States Circuit Court of Appeals at the October term, 1917, of said Court and was duly argued.

5. On January 5, 1917, said United States Circuit Court of Appeals for the Third Circuit filed its opinion affirming the judgment entered against your petitioner in favor of said respond-

ents, on the ground that the questions of negligence on the part of your petitioner and of contributory negligence on the part of the respondents were questions of fact for the jury, and that there was no error on the part of the Trial Court in submitting said questions to the jury or in the form in which they were submitted.

6. There was evidence before the jury from which the following facts might be found.

The petitioner operated a railroad known as "Bergen County Railroad," the tracks of which extended in and through the Borough of Garfield in the State of New Jersey. At and near the point where the plaintiff was injured there were two main line tracks, one known as the westbound track, on which were operated trains *from* Jersey City; the other as the eastbound track, on which were operated trains *to* Jersey City. On the southerly side of the eastbound track was a switch known as the "local siding," which was used for the receipt and delivery of freight to and from cars that might be standing thereon. This siding extended from a point some distance to the east of a street known as Hobart place, in a westerly direction adjacent to and parallel with the eastbound track; the freight house was located about thirty feet west of the westerly end of the siding. To the south of and adjacent to the siding there was a driveway, about twelve feet wide, which extended from Hobart place in a westerly direction for a distance of about three hundred and fifty feet. This was used as an approach

to the freight house and to any cars that might be on the siding. A street known as Bogart avenue intersected Hobart place some distance to the south of the railroad tracks and ran thence in a northwesterly direction, almost parallel to the siding and at a distance varying from about one hundred and sixty feet to about fifty feet southerly therefrom to a street known as Passaic street, which crossed the tracks at a distance of about seven hundred feet westerly from Hobart place. From the northerly boundary line of Bogart avenue there was an open space or driveway, which was also used as an approach to the siding and freight house. On the southerly side of the first named driveway there was a fence, which began at the westerly line of Hobart place and extended in a westerly direction for about three hundred and fifty feet, where it turned at right angles in a southerly direction for a distance of about seventy feet to the northerly line of Bogart avenue.

Immediately prior to the time of the accident there were cars standing on this siding as follows:

(a) Two loaded box cars about thirty feet east of the westerly end of the siding.

(b) Two loaded coal cars, the westerly end of which was about fifteen feet east of the easterly end of the loaded box cars.

(c) Five empty box cars, the westerly end of which was about fifteen feet east of the easterly end of the coal cars.

An eastbound freight train with about twenty empty box and coal cars moved in an easterly

direction along the eastbound track to a point some distance to the east of Hobart place and was backed into the siding for the purpose of picking up the five empty box cars. As this train moved east along the eastbound track the rear brakeman jumped off from the third hind car on the southerly side of the train (between the eastbound track and the siding) and walked through the open space between the two coal cars and the five empty box cars that were standing on the siding. After jumping off the train and crossing the siding he was then on the driveway. He looked up and down both sides of the track in each direction, the full length of the siding, and saw no one. He then ran down the driveway in an easterly direction toward Hobart place and threw the de-rail so that the train could back into the siding; in the meantime the train had been proceeding easterly and had come to a stop with the hind end about fifty feet east of the point of the switch leading into the siding. The brakeman threw the switch for the siding and gave the conductor the signal to back. He then ran along the eastbound track two or three car-lengths ahead, or west, of the rear end of the train to the point where the coupling was to be made at the five empty cars. As the brakeman ran along the eastbound track he had a view on the northerly side of the siding as far as the westerly end thereof, but he saw no one. On reaching the point opposite where he had dropped off from the train he stood at about the center of the five empty cars waiting for the coupling to be made. About six or seven minutes elapsed

from the time he had dropped off up to the moment when the coupling was made. The engineer, in accordance with signals given by this brakeman to the conductor and thence passed on to the engineer, backed into the siding and against the five empty cars.

When the train started to back from the eastbound main track into this siding the conductor stood on top of a box car at about the middle of the train in order to receive the signals from the rear brakeman, who was standing on the ground as above stated. He faced in a westerly direction, that is, the same direction in which the train was moving. He was watching the siding and the brakeman as the train moved back, and saw no one around except the brakeman. The train backed in at the rate of about four or five miles an hour and the usual stop signal was given and the brakes were applied in the usual way; the coupling was made between the rear of the train and the nearest box car, but on account of the momentum of the train and the taking up of the "slack," the five empty cars were pushed back about fifteen feet against the two coal cars that stood to the west, and after striking the coal cars all the cars moved about five feet further.

The respondent Hilt, Jr., had been playing marbles near the siding. There was no eye witness, except a youthful companion of the plaintiff, who was not called as a witness. The first man to know of the accident was a peddler, who was selling potatoes to one of the residents of a house located on the other side of the fence.

He had seen the boy about five minutes before the accident; at that time the boy was playing about twenty-five or thirty feet east of the freight house and between the freight house and westerly end of the switch. The peddler told the boy to get away or he would be hurt, but did not stop to see what the boy did, and went on selling his potatoes. About five minutes later the peddler heard the coupling of the cars, and just after that the "hollering" of the boy, and he jumped over the fence and found the boy lying on the ground on the south side of the switch and about a foot from the rail. At that time the train was standing still, alongside of the boy. He picked the boy up and held him about four minutes and then turned him over to one of the train crew, who took the boy to the station, whence he was removed to the hospital. The place where the boy was picked up was about sixty feet west of the northwest corner of the fence adjacent to the driveway and about one hundred and fifty feet east of the westerly end of the siding.

The boy said he had been playing marbles for about an hour before the accident and that one of them rolled under a car towards the other side of the track (meaning the northerly rail of the siding). He reached under the car with his foot. To do this he had to get all the way *under* the car. He caught it with his foot and pulled it towards him and "quick got out" and then put his foot under the car the second time to get the marble, saying "that he thought that if he reached after the marble with his hand instead of his foot he might get all

smashed to pieces," because he thought the train was going to move right away. The train did move and his foot was run over. At the time of the accident the boy was forty-four inches tall. The distance between the rails of the siding was the standard gauge of fifty-six and a half inches.

The first knowledge that any of the petitioner's employees had of the accident was when the rear brakeman was told by the peddler that somebody had been hurt. None of the crew had seen the respondent or anyone else at or near the cars on the side track at the time the train backed in.

For some years prior to the accident children of all ages were accustomed to play at and near the siding and on and about the cars standing thereon. Some of the petitioner's employees knew of this custom and at various times had driven children away from the siding and the cars.

7. At the time of the trial of said action there was and still is in the State of New Jersey a statute known as section 55 of "An Act concerning railroads (Revision of 1903)," which reads as follows:

> "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained,

and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

Pamph. Laws of N. J. of 1903, p. 673.
3 Comp. St. of 1910, page 4245, sec. 55.

8. The Trial Judge ruled that this statute was not applicable to the case of a boy of the age of the respondent Hilt, Jr., and such ruling was affirmed by said United States Circuit Court of Appeals for the Third Circuit.

9. Your petitioner respectfully shows that this ruling of said Courts with respect to the construction and application of said statute is directly contrary to the ruling of the New Jersey Supreme Court in construing the same statute. The New Jersey Supreme Court held in the case of *Barcolini* v. *West Jersey, etc. R. Co.*, 82 N. J. L. 107, 81 Atl. 494, that the said statute was a bar to recovery by any person who walks, stands or plays upon a railroad, without distinction as to age or physical or mental condition. Although this decision of the New Jersey Supreme Court was not by the highest court of that State, your petitioner respectfully shows that it is the only reported case in the New Jersey decisions in which this statute has been construed with reference to its application to children; and that since the passage of this statute or a former statute similar in language, in the year 1869, there is no reported ruling of any decision by the Courts of New Jersey which is in accord with the said ruling of the said United States Circuit Court of Appeals for the Third Circuit.

10. Your petitioner further shows that the ruling of said United States Circuit Court of Appeals for the Third Circuit on this point is also at variance with the decisions of the courts of other States of the United States involving the construction of similar statutes. Similar statutes in the States of New York, New Hampshire, Missouri and Maine have been construed in the same manner in which the New Jersey Supreme Court construed the New Jersey statute in the Barcolini case, *supra*.

11. The question presented in this case is whether the Federal courts shall follow the construction of the statute in question, which has been adopted by the New Jersey Supreme Court and by the Courts of other States, or whether another construction shall be adopted whereby said statute shall be held to be inapplicable to minor plaintiffs. This question has never heretofore been presented to this Court for determination.

12. Your petitioner respectfully represents that a writ of certiorari to bring up for review the decision of the United States Circuit Court of Appeals for the Third Circuit should be granted for the following reasons:

(a) Because the case involves an important question of the construction of a statute of the State of New Jersey and of similar statutes in other States, with particular reference to the application thereof to minor plaintiffs.

(b) Because the decision of the United States Circuit Court of Appeals for the Third Circuit in the present case is at variance with the decision of the New Jersey Supreme Court con-

struing said statute and with the decisions of other States construing similar statutes.

(c) Because the question of the application of this statute to minor plaintiffs has never been decided by this Court.

(d) Because it is important for the information of litigants to have a final determination on the question as to whether the construction of said statute adopted by the United States Circuit Court of Appeals for the Third Circuit in the present case is correct, or whether the construction of said statute by the Supreme Court of the State of New Jersey is correct. Practically all of the important railroads that operate in and through the State of New Jersey are organized under the laws of some State foreign to New Jersey, and therefore actions of this kind where the plaintiffs are residents of the State of New Jersey may be brought either in the State Courts or in the Federal Courts; and it is therefore important to have a uniform rule of construction.

WHEREFORE your petitioner prays that this Honorable Court will grant its writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to bring up this case to this Honorable Court for such proceedings thereon as to this Honorable Court may seem just.

ERIE RAILROAD COMPANY,
Petitioner.

By

DAVID BOSMAN,
Vice-President.

GEO. S. HOBART,
Attorney for Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss:*

DAVID BOSMAN, being duly sworn according to law on his oath, says:

I am the Vice-President of Erie Railroad Company, the petitioner named in the foregoing petition. The same is true of my own knowledge and belief, except in so far as it refers to the transcript of the case and the decisions of other courts, as to which matters my knowledge and information are received from the printed transcript of the case and from information given to me by the attorneys of said petitioner, and except also as to the circumstances of the accident and the litigation resulting, as to which my knowledge is received from information given to me by the attorneys of said Railroad Company.

DAVID BOSMAN.

Subscribed and sworn to at New York City, N. Y., this January 25th, A. D. 1918, before me, a notary public in and for said County and State duly commissioned and sworn, as witness my hand and official seal:

A. L. TRAVSI,
Notary Public No. 106, Kings County.
Certificate filed in New York County, No. 61.
My commission expires March 30, 1919.
N. Y. County Register's Office No. 9069.

[SEAL.]

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

GEO. S. HOBART,
Of Counsel with Petitioner.

Brief in Support of Petition for Writ of Certiorari.

The question in this case is whether a certain statute of the State of New Jersey providing that if any person shall be injured by an engine or car "while walking, standing or playing on any railroad," such person shall be deemed to have contributed to the injury sustained and shall not recover any damages from the Company owning or operating said railroad is applicable to the case of a boy about six years of age who was injured while walking, standing or playing on the railroad in violation of said statute. The statute is known as section 55 of "An Act concerning railroads (Revision of 1903)." (See N. J. Pamph. Laws of 1903, p. 673, 3 Compiled Stats., 1910, p. 4245, Sec. 55.)

The Circuit Court of Appeals in the present case held that this statute was not applicable to the plaintiff Hilt, Jr., basing its conclusion on the ground that no decision of the highest court of the State of New Jersey required it to hold that the trial court should have taken from the jury the question of the plaintiff's contributory negligence and reaffirming the decisions in said Court of *Snare & Triest Co.* v. *Friedman*, 169 Fed. 1; *Erie R. Co.*, v. *Swiderski*, 197 Fed. 521, and *Chesko* v. *D. & H. Co.*, 218 Fed. 804. It is claimed by the petitioner that the statute in question is applicable to all persons who may be injured while violating same, regardless of their age. In support of this claim we beg leave to submit the following

summary of the history of this statute and the construction thereof in the State of New Jersey, together with a reference to cases in other States construing similar statutes.

HISTORY OF THE STATUTE AND CONSTRUCTION THEREOF IN NEW JERSEY.

The second clause of this section beginning, "if any person shall be injured," was originally passed in 1869, and is known as Chapter 285, of Laws of that year (p. 806). It is entitled "An Act to Prevent Accidents on Railroads." It was re-enacted as Section 67 of "An Act respecting railroads and canals," approved March 27, 1874. (See Vol. II, General Statutes of New Jersey (of 1896), page 2680, Section 178.)

The first clause of the present Section 55 is a re-enactment of the last clause of Section 32 of the statute entitled "An Act to authorize the formation of railroad corporations and regulate the same," approved April 2, 1873 (P. L. 1873, p. 88). As passed in 1873, this provision was incorporated with the provisions of the law relative to the construction and maintenance of fences and cattle guards. (See Vol. II, Gen. Stat. p. 2646.)

When the revised Railroad Law of 1903 was passed, this clause was taken out of the section relative to fences, and put in its present position as the first paragraph of Section 55.

(a) *The application of the statute is not limited to the main line of a railroad.*

The Act of 1869 was considered in *Diebold* v. *Penn. R. R. Co.*, 50 N. J. L. 478. In that case the plaintiff's intestate had gone into the freight station to transact some business with one of the railroad clerks. When next seen he was walking in the freight yard in company with an employee of the defendant, and a moment later while standing "on or near" the track of the railroad in the yard, he was struck by a freight car that was being shunted, and was killed. In referring to this statute the court said (italics ours):

> "It is quite evident that Diebold's death was occasioned solely by his standing on defendant's railroad, in contravention to the plain provisions of this statute. Whether he was standing between the rails or beside them is immaterial. The language of the Circuit Judge in refusing the non-suit gives to this act its proper construction. 'I think,' he said, 'that the rule, with regard to standing on a track applies also to a man standing so near a track as to be struck by a car.'
>
> "The contention that this act applies only to the main tracks of railroads is not tenable. The express object of the statute is to declare certain actions as contributory negligence, *per se*, because of their obvious foolhardiness. It is evident that such conduct may take place at any point on a railroad and be more or less foolhardy. The act contemplates injuries not by locomotive engines alone, but by 'cars' or 'a car.' *The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selec-*

> *tion for these purposes, shall bar recovery for injuries thereby sustained.* Now, if the main track of a railroad, where all the proper appliances are provided, such as gates, flagmen and signals, where trains proclaim their approach by the ringing of bells and the blowing of whistles, if this be a place of admitted danger, how much more so is the privacy of a drilling yard, where employees, alive to the dangers of their calling, are alone admitted, and where no system of precautionary signals is enforced or required. The greater the imprudence, the more aptly does the statute apply" (p. 480).

The foregoing decision was by the New Jersey Supreme Court. It was cited with approval by the highest court of the State (Court of Errors and Appeals) in the cases of *Phillips* v. *Library Co.*, 55 N. J. L. 307, at page 315; and *Furey* v. *N. Y. Central R. Co.*, 67 N. J. L. 270, at page 274.

(b) *The statute does not apply in a case where the plaintiff was passing from one side of the track to another through an open space between cars.*

The statute is referred to in *Furey* v. *N. Y. C. &c. R. R. Co.*, 67 N. J. L. 270, where the N. J. Court of Errors and Appeals said by way of dictum, that the statute did not apply to the case then under consideration, for the reason that the plaintiff was *crossing* the track, and was neither walking nor standing nor playing on them (p. 278).

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(c) *The clause as to jumping on or off a car while in motion bars recovery for any injuries thereby sustained.*

The act was again referred to in *Powell* v. *Erie Railroad Co.*, 70 N. J. L. 290, where the New Jersey Court of Errors and Appeals held that under this statute a person injured while jumping on or off a train in motion was guilty of contributory negligence as a matter of law. Judgment of non-suit sustained.

(d) *The statute applies to all persons without distinction as to age.*

In *Barcolini* v. *West Jersey &c. R. R. Co.*, 82 N. J. L. 107, 81 Atl., p. 494, the plaintiff was twenty-one months old and was hit by a train while straying on defendant's tracks. The New Jersey Supreme Court in an opinion filed November 13, 1911, held that in the absence of proof of wilful negligence a verdict should have been directed for the defendant, saying:

> "This statute is a bar to recovery by any person who walks, stands or plays upon a railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned, and applies to all persons alike, without distinction as to their age or physical or mental condition."

The case last cited did not reach the Court of Errors and Appeals of the State of New Jersey and hence the construction of the statute by the Supreme Court (not being the highest court of the State) is, of course, not binding upon this court. We submit, however, that this decision

is correct. The original statute as shown above is entitled, "An act to prevent accidents on railroads." No logical reason can be suggested why it is not just as important to "prevent accidents" to minors as it is to persons of mature age. This statute either in its original form or as part of some other legislation (as shown above in the history of the statute) has been in effect in New Jersey for nearly fifty years. No doubt many cases have been tried at *nisi prius*, in which the question of the application of the statute to minors must have been considered. But it is a remarkable fact that the question has not yet been squarely passed upon by the Court of Errors and Appeals. It seems to have been taken for granted by the Bar of the State that the statute, as was stated by the New Jersey Supreme Court in the *Barcolini* case, "precludes any recovery for damages due to injuries received under the conditions therein mentioned * * * without distinction as to their age or physical or mental condition."

The use in the statute of the word "playing" indicates, we submit, a legislative intent that the statute should be applicable to children—at least to those who are old enough to "play," as that word is generally used with reference to children rather than adults. As pointed out by the New Jersey Supreme Court in the *Diebold* case, *supra*,

> "The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selection for these purposes shall bar recovery for injuries thereby sustained."

That case has received the approval of the highest court of New Jersey on two occasions, as shown above (Phillips and Furey cases).

In the case of *Erie Railroad Co.* v. *Swiderski*, 197 Fed. 521, the court refers to the case of *Barney* v. *Hannibal, etc., R. Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847, in which the statute under consideration made it a misdemeanor for "any person, minor or adult, to climb," etc., "upon moving cars"; and then argues that this Missouri statute recognized the necessity of clearness of expression by using the words "any person, minor or adult." It is, however, to be noted that the Missouri statute does not use the word "playing" or any similar language. In the absence of words which would commonly be understood as referring to children, it might well be thought necessary to specifically mention "minors" in order to include them within the meaning of the word "person," as used in the statute. But we submit that this argument does not apply to a case like that of the New Jersey statute where the very words themselves are broad enough to include children, and one of the important words is generally understood as applicable only to children.

In the *Swiderski* opinion the court also refers to the Bankrupt Law, wherein Congress added a legislative definition to make the word "person" include women. There may be some room for argument as to whether such a legislative definition was strictly necessary, but however that may be, it is of interest to observe that in

the Bankrupt Act nothing was said as to whether the word "person" should include *minors;* nevertheless, it has been held that a "minor" is a person within the meaning of the latter word, as used in that statute, providing that any person who "owes debts," except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt. *In re Walrath,* 175 Fed. 243. The United States District Court for the Northern District of New York said in that case:

> "The law does not say 'any adult person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt,' but 'any person;' and until it can be demonstrated that an infant who owes a debt is not a 'person,' such infant is within the law and entitled to its benefits. Such infant is clearly included in the term 'any person who owes debts,' etc. It would have been just as easy for Congress to have said 'Adult persons who owe debts,' or 'Any adult person who owes debts,' and thus have excluded infants who owe debts, as to have used the language it did."

So far as careful search discloses the only reported case in the Court of Errors and Appeals of New Jersey, in which the question of the application of Section 55 has been considered, is *Carleo* v. *Delaware, etc., R. R. Co.,* 77 N. J. L. 607 (decided March, 1909). In that case the plaintiff was a child about two and a half years of age; he was picked up from the ground at a point alongside of or very near to a street crossing just after a train had passed. The opinion does not refer in terms to Section 55, but an examination of the briefs filed with the

court shows that the defendant relied upon Section 55 as a bar to recovery. The court held that there was sufficient evidence to justify the jury in finding that the accident happened *on the street crossing,* and a verdict for plaintiff was therefore sustained, there being some evidence of negligence on the part of the company either in the managemnet of the ages at the crossing or in the giving of the statutory signals of the approach of the train. Of course, under these circumstances it was not necessary for the court to pass upon the question of the application of Section 55 because that in terms provides that it shall not apply to the crossing of a railroad by any person at any lawful, public or private crossing. We suggest, however, that if the New Jersey Court thought that Section 55 was *not* applicable to a child of that age, it would have been unnecessary to discuss the question of whether the accident happened on or off the crossing. The fact that the court found it necessary to pass upon the question of where the accident happened justifies the inference that Section 55 would have been held to be applicable *if* the accident had happened away from the crossing.

Another case in the Court of Errors and Appeals in which the point may have been considered, although it was not mentioned in the opinion, is *Tarlucki* v. *West Jersey, etc., R. R.,* 86 N. J. L. 301. The plaintiff was a boy about eight years of age and was injured by coming in contact with the electrified third rail while he was passing from one side of the railroad to the other. A demurrer to the original dec-

laration was sustained by the Supreme Court on the ground that the facts stated in the declaration showed a manifest trespass. See 80 N. J. L. 688. Thereafter an amended declaration was filed setting up that at the place where the plaintiff was injured there was an "ancient by-road." This declaration was sustained by the Supreme Court. See 82 N. J. L. 138. Thereafter the case came to trial and it was held that there was sufficient evidence to justify the jury in inferring that the plaintiff was crossing the track at a point which had been used by the public as a means of passage from one side of the road to the other for over sixty years. The inference from this opinion is that the plaintiff would have been barred of recovery *unless* there had been sufficient evidence to make it a question of fact for the jury as to whether or not he came within the exception of Section 55.

It may be urged that the word "person," as used in Section 55, should not be held to be applicable to minors, and indeed, it was so ruled by this court in *Erie R. R. Co.* v. *Swiderski*, 197 Fed. 521, at p. 524, where the court said (italics ours):

> "If Congress in enacting the Bankrupt Law felt constrained to add a legislative definition to make the word 'person' include women, it would seem reasonable to conclude that the Legislature of New Jersey did not mean to include under the word 'person' children so young as in law to be *incapable of contributory* negligence."

This argument might be sound so far as relates to children, who, as a matter of law, are "incapable" of contributory negligence—al-

though it is contrary to the ruling of the New Jersey Supreme Court in the Barcolini case, where the plaintiff was only 21 months of age; but we respectfully submit that there is room for distinction, so far as concerns the application of the statute, between those children who as a matter of law, are incapable of contributory negligence and those who, as a matter of *fact,* might be held by a jury to be capable of contributory negligence, and properly chargeable therewith under the circumstances of the particular case. If the statute is construed to be applicable to the latter class, it amounts merely to a legislative declaration that under the conditions named in the statute the plaintiff shall be chargeable with contributory negligence as a matter of law; and it merely removes from the jury the right to determine, in that class of cases, whether the particular plaintiff is chargeable with contributory negligence as a matter of fact.

It is well settled that children of a certain age may be held chargeable with contributory negligence as a matter of fact—and, indeed, under certain circumstances, *as a matter of law,* without any statute at all upon the subject. [redacted]

The power of the legislature to prescribe that contributory negligence shall *not* bar recovery of damages for personal injuries is well settled. A summary of the cases will be found in *Sexton* v. *Newark District Telegraph Co.,* 84 N. J. L. 85; also in a note to the report of the decision

of the New York Court of Appeals in the case of *Jensen* v. *Southern Pacific Co.*, L. R. A. 1916-A, p. 403, at p. 413 and following: also in the decision of the United States Supreme Court in *Second Employers' Liability Cases*, 223 U. S. 1, at p. 51; also *Brost* v. *Whitall Tatum Co.*, 99 Atl. 315. The cases cited are those where the defense of contributory negligence has been *removed* either in whole or in part. Illustrations of cases where the defense of contributory negligence has been *transferred* from the domain of the court to the province of the jury are found in the decisions construing the so-called "crossing statutes" of the State of New Jersey.

See:

Brown v. *Erie R. R. Co.*, 87 N. J. L. 487, 91 Atl. 1023;

Fernetti v. *West Jersey & S. R. Co.*, 87 N. J. L. 268, 93 Atl. 576;

Waibel v. *West Jersey & S. R. Co.*, 87 N. J. L. 573, 94 Atl. 951;

Schnackenberg v. *Delaware, etc., R. Co.*, 98 Atl. 266;

Kratz v. *Delaware, etc., R. Co.*, 100 Atl. 208.

If the legislature has power to abolish the defense of contributory negligence either in whole or in part, or if it has power to enact that the question of contributory negligence shall in certain cases be one of fact for the jury rather than of law for the court, no logical reason can be suggested why the legislature has not also the power to declare what shall con-

stitute contributory negligence, which would bar recovery as a matter of law.

The power of a legislature to enact, without reference to the age of the persons affected thereby, a statute, such as Section 55, being clear, the further question is whether the Legislature of New Jersey did so enact when it passed Section 55 and its similar preceding statutes. As shown above, the Supreme Court of the State of New Jersey, in the Barcolini case, held that the statute applied to all persons without distinction as to age or physical or mental condition. Similar statutes in other states have been similarly construed. Thus, in the State of New York, there is a statute known as Section 53 of the Railroad Law, which reads as follows:

> "No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same."

In the case of *Butler* v. *New York Central R. Co.*, 152 Fed. 976, the Circuit Court of Appeals for the Second Circuit held that the statute applied to the case of a girl 16 years of age, who was struck by a locomotive while walking along the railroad, in violation of the statute. A direction of verdict for the defendant was affirmed, the court saying:

> "The evidence does not warrant a finding that the engine driver was reckless or grossly negligent in running his train along the path upon which a person was walking at a safe distance from the rails, nor in

> failing to anticipate that, when the semaphore was reached, the deceased would, without any glance behind to see what the conditions were, step from a position of safety to one of deadly peril."

In *Holmes* v. *Delaware & Hudson Co.*, 112 N. Y. Supp. 421, 128 App. Div. 24 (see also 113 N. Y. Supp. 1134), plaintiff, a boy of 16 years of age, was walking along the tracks of the defendant and found a railroad torpedo. He tried to open it and was injured by the resulting explosion. Judgment for plaintiff was reversed, the court saying:

> "The claim of the plaintiff rests upon the assumption that the defendant invited, enticed or allured him to come upon the railroad tracks. The claim is not tenable. The plaintiff was not invited upon the railroad tracks in any sense further than that the defendant had not taken occasion to prevent the public from using them as a footpath. * * * Indeed, one of the statutes of the state provided that:
>
> (Quoting Sec. 53.)
>
> "Under such circumstances, the plaintiff was there by sufferance only, and the company did not owe him the duty of active vigilance to see that he was not injured while upon its land for his own convenience."

The New York Court of Appeals, in *Keller* v. *Erie R. R.*, 183 N. Y. 67, 75 N. E. 965, referring to this statute, said:

> "An act expressly prohibited by the public statute is, in its inception and always must continue to be, unlawful. The defendant's powers and capacity to act are defined and controlled by statute law, and, as a creature of statute, it could, neither expressly nor

> passively, confer a right which the statute denies. Whoever walks upon, or along, the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the law and is like a trespasser, and the company's servants are under no other obligation than to refrain from wilfully, or recklessly, injuring him."

While it is true that the last cited case was not that of a minor, the language if the New York Court of Appeals in construing the statute is broad enough to apply to all persons, regardless of age.

To the same effect see the case of *Marra* v. *New York Central R. R.*, 139 App. Div. 707, 124 N. Y. Supp. 443.

In *Colston v. Boston & Maine R. R.*, 99 Atl. 649 (N. H.), a statute provided as follows:

> "Section 1. If any person shall without right enter upon or remain in any right of way, tracks, yard, station ground, bridge depot, or other building of any railroad, when notice has been posted forbidding such trespass, he may be fined not exceeding twenty dollars; and no right to enter or be upon any railroad track shall be implied from custom or user however long continued.
>
> "Section 2. If any person shall be injured while engaged in any act prohibited by section 1 of this act, neither he nor his executor or administrator shall have any cause of action against the railroad company * * * arising from such injury unless the injuries are occasioned by the wilful or gross negligence of the railroad or its employees."

Held that under this statute a trespassers upon the railroad tracks was not entitled to recover in the absence of proof that the injuries were caused by wilful or gross negligence. The report does not show whether or not the plaintiff was a minor.

The same statute of New Hampshire was considered in the case of *Nappi* v. *Grand Trunk Ry. Co.*, 99 Atl. 185, and was held to be applicable to a trespassing child, who, at the time of the accident, was about four years of age. The court said:

> "The plaintiff's intestate was a trespasser upon the railroad tracks when he was killed. The fact that he was an infant makes no difference."

In *Barney* v. *Hannibal &c. R. R. Co.*, 126 Mo., 372; 28 S. W. 1069, 26 L. R. A. 847, the plaintiff was not quite six years of age. He was injured while stealing a ride on a car, caused by slipping from the car and the wheel running over his foot. A statute of the State made it a misdemeanor for "any person, minor or adult, to climb upon, hold to, or in any manner attach himself to, any locomotive engine or car while the same is in motion, or running into or through any city or town in this State." The plaintiff's attorney claimed that this law did not apply to "babies," but the Supreme Court of the State of Missouri said:

> "While the law may not apply in a criminal proceeding to a child of very tender years, yet still, for the purposes of a civil action, the consequences of the unlawful act must be the same as in the case

of an infant, even of very tender years, as in the case of an adult."

In *Kapernaros* v. *Boston & M. R. R.*, 99 Atl. 441 (Me.), a statute provided as follows:

"No railroad corporation shall be liable for the death of a person walking or being on its road contrary to law." R. S. c. 52, Sec. 76.

"Whoever without right, stands or walks on a railroad track forfeits not less than five, nor more than twenty dollars, to be recovered by complainant." *Id.* Sec. 77.

The court held that this statute was applicable to the case of a trespassing child "slightly less than two years old."

GEORGE S. HOBART,
Of Counsel with Petitioner.

Office Supreme Court, U. S.
FILED
FEB 13 1918
JAMES D. MAHER,
CLERK.

No. 846

United States Supreme Court

OCTOBER TERM, 1917.

ERIE RAILROAD CO.,
Petitioner,
vs.
EDWIN J. HILT, JR., by next friend, and EDWIN J. HILT, SR.,
Respondents.

On Certiorari.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

On April 6, 1916, Edwin J. Hilt, Jr., was run over by a railroad car of the Erie Railroad Company at Garfield, in the State of New Jersey, and as a result thereof, his leg was cut off above the knee. He brought suit to recover damages for such injnries in the United States District Court for the District of New Jersey. His father also sues to recover damages for the medical expenses and the loss of services of his son during the latter's minority, the two plaintiff's uniting in the action by virtue of the provisions of the "Practice Act of 1912" of the State of New Jersey (Ch. 231, P. L. 1912, p. 377, Sec. 4).

At the trial of the case a verdict was rendered by the jury in the sum of Twenty-five thousand dollars ($25,000.) in favor of Hilt. Jr., and for the sum of Fifteen hundred dollars ($1500.) in favor of Hilt, Sr. On the rule to show cause, the

Trial Court ordered that a new trial should be granted as to Hilt, Jr., unless all in excess of the sum of Ten thousand dollars ($10,000.) was remitted. Consent to the reduction of the verdict on that case to that amount was thereafter filed and judgment was duly entered for said sum of $10,000. in favor of Hilt, Jr., and for the sum of $1500. in favor of Hilt, Sr.

On September 4th, 1917, an order was made by the United States District Court for the District of New Jersey, allowing a writ of error to the United States Circuit Court of Appeals for the Third Circuit. The argument of such writ came on to be heard before said United States Circuit Court of Appeals at the October Term, 1917, of said Court and was duly argued.

On January 5th, 1917, the United States Circuit Court of Appeals for the Third Circuit filed its opinion affirming the judgments entered in the United States District Court.

The opinion of the United States Circuit Court of Appeals is as follows:

McPherson, C. J.:

A branch of the defendant's railroad runs through the town of Garfield, New Jersey. On April 6, 1916, Edwin J. Hilt, Jr., one of the plaintiffs, a boy less than 7 years old, was run over and severely hurt on a switch track or siding near the station, and this suit is brought by his father and himself to recover damages for the injury.

At the place of the accident there are two main tracks and a siding; trains run toward Jersey City on the eastbound track, and south of this track is the siding which runs westward to the station and is used for the receipt and delivery of freight. On the day in question, nine cars stood

on the siding, first, five empty cars near its junction with the eastbound track; then two loaded coal cars, separated from the empty cars by an open space of 15 or 20 feet, the remaining two being loaded box cars standing near the station and separated from the coal cars by a space of similar width. Immediately south of the siding there was open ground about 20 feet wide and more than 380 feet long. This was chiefly used as a driveway to the station and the siding, but for a good many years it has been also used as a playground by children, some of them very young, who were accustomed to play on the open ground, on the siding itself, and over and about the cars that might be standing on the rails. This was a frequent practice, and was well known to the servants of the railroad. Sometimes the children would be driven or ordered away, but this had little effect on the practice, as there was no barrier to keep them off.

On April 6, a train consisting of an engine and 20 cars was moving toward Jersey City on the eastbound track. It had been ordered to pick up the five empty cars, and as the train neared the junction of the siding with the eastbound track, the rear brakeman alighted from a car toward the rear of the train for the purpose of setting the switch. He descended on the southerly side of the train, between the eastbound track and the siding, and crossed the siding through the space between the coal cars and the empty cars, thus reaching the driveway. He testified that he looked up and down both rails of the siding, but saw no one. Thereupon he ran east and turned the switch, the train meanwhile having moved east and stopped at a point where its rear end was about 50 feet beyond the switch. The brakeman then gave the signal to back, and ran west along the north rail

of the siding to the place where the empty cars were to be coupled. As he ran he could see along the northerly side of the siding as far as its western end, but still saw no one. He ran as far as the middle of the empty cars, and waited to make the coupling. These movements required about six or seven minutes, and the engineer, obeying the signals, backed into the siding against the empty cars. When the train started to back, the conductor testified that he was on top of a car about the middle of the train, was facing west, and was watching the siding and the brakeman, but saw no one except the brakeman. The train was moving about four or five miles an hour, and stopped on the usual signal, and in the usual way; the coupling was made, but the momentum of the train pushed back the empty cars against the coal cars and moved these seven cars a few feet further. The two loaded box cars were not disturbed.

The boy had been playing marbles near the siding with a companion of his own age, who was not called as a witness. A peddler who was selling potatoes at a house in the neighborhood saw the boys near the siding about five minutes before the accident and told them to get away or they would be hurt, but he paid no further attention to the matter until he heard the coupling of cars and the cries of the injured boy just afterward, whereupon he hastened to the spot and found the boy lying on the ground close to the rail on the south side of the siding, and close to the train, which was then standing still. The boy testified that he had been playing marbles for an hour before the accident, and that a marble had rolled under one of the five empty cars and was lying toward the north rail of the siding. He tried to recover it by reaching under the car with his foot and pulling the marble toward him, but drew back quickly be-

cause he thought the cars might be going to move. He tried a second time, however, and while he was thus engaged the train backed in and his left leg was so badly injured that amputation was necessary. At the trial no question was raised about the duty of the train to give notice of its movements by bell or whistle; the plaintiffs' position was that the railroad's testimony, already referred to, could not be accepted, that the boy must have been visible, and that the brakeman was negligent in failing to see him and in failing to give him notice of the danger. Witnesses testified that both boys were seen at the spot immediately after the accident.

On the question of the railroad's negligence, it is clear that the jury was the proper tribunal to decide which account was the most reliable, and what inferences should be drawn from the testimony after the facts were determined. Under the charge they must have found that the brakeman did not exercise reasonable care, and we think the conflicting evidence justified the court in submitting this question.

Whether, considering his tender years, the boy was to be chargeable with contributory negligence as a matter of law, either as a general proposition or under Sec. 55 of the N. J. Statute (3 Comp. Stat., p. 4245), is not an open question in this court. No decision of the highest court of the state requires us to hold that the District Court should have taken this question from the jury, and our own cases (*Snare & Triest Co. vs. Friedman,* 169 Fed., 1, *Erie R. R. vs. Swiderski,* 197 Fed., 521, *Chesko vs. Del. & Hud. Co.,* 218 Fed., 804) are to the contrary. The boy's contributory negligence was submitted to the jury as a question of fact, and this was all the defendant could properly ask.

Upon this point there was pertinent testimony by the boy that he had never played on the siding or around the cars before, and had never been in the driveway or near the siding; that he had never seen cars going up and down the siding; and knew nothing about the movement of cars thereon; that on the day in question he saw no railroad men, no engine or train, and did not know that switching was being done or that cars were to be moved. He testified that he knew he would be hurt if a car ran over him, and gave some other answers that were in the railroad's favor; but the whole subject was for the jury and was submitted under proper instructions.

The father's contributory negligence was also submitted in language to which no exception was taken.

No other assignment of error seems to need consideration, and accordingly the judgment is

AFFIRMED.

The defendant (petitioner in this action) now files a petition praying that a writ of certiorari may issue directed to the United States Circuit Court of Appeals for the Third Circuit, requiring that Court to certify the record for review.

The section of the statute involved is Section 55 of the "Act concerning railroads (Revision of 1903)" and reads as follows:

> "Sec. 55. It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to

have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

The New Jersey Supreme Court in the case of *Barcolini vs. West Jersey, etc., R.R. Co.,* 82 N. J. L., 107; 81 Atlantic, 4941, applied the provisions of the statute to all persons no matter how immature the age thereof, while the United States Circuit Court of Appeals for the Third Circuit held the provision of the statute to be inapplicable to immature children. *Swiderski vs. Erie Railroad Co.,* 197 Fed., 521; and see also opinion of Circuit Court of Appeals herein.

Petitioner now asks this court to construe the statute.

ARGUMENT.

POINT I.

The petition presents no question of sufficient gravity and general importance to require the issuance of the writ.

The object of the petition is to inform the Court of the facts of the case, the action or proceedings which have theretofore been had, and the reasons assigned for the issuing of the writ.

This Court has repeatedly held that the United States Circuit Court of Appeals was created for the purpose of relieving this Court of general litigation which impeded the examination and disposition of cases of public concern and delayed suitors in the pursuit of justice, and the power of the Court to require judgments or decrees of the Circuit Court of Appeals to be certified for review is

one which should be sparingly exercised, and can only be properly invoked when the circumstances of the case satisfy the court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of the nation in its internal or external relations, demands such exercise.

Hamilton-Brown Shoe Co. vs. Wolf Bros. Co., 240 U. S., 251, 258;
Forsyth vs. Hammond, 166 U. S., 506;
In Re: *Woods,* 143 U. S., 202;
Re: *Lau Ow Bew,* 144 U. S., 583;
Re: *Lau Ow Bew vs. United States,* 144 U. S., 47.

Indeed, in the case of *American Construction Co. vs. Jacksonville T. & K. W. R. Co.,* 148 U. S., 372, at page 383 (decided March 27th, 1893), this Court said, in speaking of the above:

> "Accordingly, while there have been many applications to this Court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted. * * * "

In the case at hand the only question raised is the construction of a statute of the State of New Jersey. Two inquiries, then, confront us: (a) Is there in this case such a conflict of decision as would justify the issuance of the writ? (b) Is the matter of sufficient importance to require the issuance of the writ?

A.

Is there in this case such a conflict of decision as would justify the issuance of the writ?

The construction by the United States Circuit Court of Appeals of section 55 of the Railroad Act of New Jersey differs from the construction thereof by the New Jersey Supreme Court. There may be said, therefore, to be a conflict of decision between *a* state court and the United States Circuit Court of Appeals. It is not every conflict of decision, however, of which the United States Supreme Court will take cognizance. It will not take cognizance of conflict of decision between a state court, not the highest court in the state, and a Federal Court of Appeals. It is entitled to have the judgment of the highest court in the state. The New Jersey Supreme Court is not the highest court in the State of New Jersey. Such is the Court of Errors and Appeals of the State of New Jersey. Appeals lie from the Supreme Court of the State of New Jersey to the Court of Errors and Appeals of that State. That Court has not construed the section of the statute involved.

It is settled doctrine that the Federal Courts will in general adopt and follow the decisions of the state courts in the construction of their own constitution and statutes, *when that construction has been settled* by the decisions of the highest tribunals.

Gage v. Pumpelly, 115 U. S., 454; 29 Law Ed., 449;
Clement v. Packer, 125 U. S., 309; 31 Law Ed., 721.

The construction of the section of the statute adopted by the New Jersey Supreme Court is not binding upon the Federal Courts.

There is not, we submit, in this case a conflict of decision which will justify the issuance of the writ.

The issuance of the writ in this case and a determination of the question involved would not settle the question so as to avoid a conflict of decision between the state courts and the Federal Court of Appeal, and thus secure uniformity of decision. The determination of this court upon the construction of the state statute would not be determinative thereof so far as the state courts are concerned. Where the Federal Courts differ in their decisions upon the construction of the state statute from the decision of the State Courts relative thereto, the construction of the State Courts generally prevails—provided such decision be that of the highest court in the state—and the Federal Courts, including this court, follow the state courts in the construction of their constitution and statutes.

Clement v. Packer, supra;
Snare & Triest Co. v. Friedman, 169 Fed., 1;
Wade v. Travis County, 174 U. S., 508:
Sunset Telephone & Tel. Co. v. City of Pomona, 172 Fed., 835.

What, then, would be the effect of the granting of the petition, the issuance of the writ and a decision upon the question involved in this case? Of course it would determine the case at hand. It would not establish a principle; it would not avoid conflict of decision between the state courts and the Federal Courts of Appeal, nor secure uniformity of decision.

We submit, therefore, that while the writ will issue to avoid conflict of decisions between the state courts and Federal Courts of Appeal, in order to secure uniformity of decision, yet, under the circumstances of the case in hand, the writ should not issue.

B.

Is the matter of sufficient importance to require the issuance of the writ?

We submit the question involved is not of sufficient gravity or general importance to require the issuance of the writ.

The question involved is the construction to be placed upon a section of the state statute relating to persons walking, standing or playing upon a railroad track. No question affecting the nation in its internal or external affairs is raised; no conflict between two or more courts of appeal appears; no question of general importance exists. The question is purely one of local law depending upon the construction to be placed by the courts upon the statute involved.

In *re Woods*, 143 U. S., 202, upon an application for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, to review a judgment of that court affirming a judgment of the Circuit Court of the United States for the District of Minnesota in favor of August Lindvall against John Woods and Stephen B. Lovejoy for personal injury caused by the negligence of Woods and Lovejoy, in which the question involved was one of local law depending on the construction of the statute of the state, this Court said:

"We do not regard the inquiry as to wheth-

> er it was settled law in the State of Minnesota that a judgment of dismissal in a former suit such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

So in this case where the decision of this Court of the question involved will not be finally determinative upon other actions brought under the same statute, the matter is not of sufficient gravity or general importance as to require the issuance of the writ.

POINT II.

Section 55 of the Act entitled "An act concerning Railroads (Revision of 1903)" does not apply to children of immature years.

The section of the statute involved has been hereinbefore set forth. The section has not been construed by the Court of Errors and Appeals of New Jersey (the highest court in the state) as to the application of the same to children of immature years. In the case of *Barcolini v. West Jersey etc. R. Co.*, 82 N. J. L. 107, 81 Atlantic 494 (decided November 13, 1911) the New Jersey Supreme Court held that the statute was applicable to "all persons alike, without distinction as to their age, or physical or mental condition." The case was never carried to the Court of Errors and Appeals of New Jersey.

That the statute was not intended to apply to infants of immature years is clear. We feel that we cannot present a better argument that that presented in the opinion in the case of *Swiderski v. Erie Railroad Co.*, 197 Fed. 521, decided by the United States Circuit Court of Appeals for the Third Circuit; the Court, after setting forth the facts of the case construed the statute as follows:

> "It is now, as it was upon the trial, contended by defendant that peremptory instructions in its favor should have been given on two grounds: First, that plaintiff's recovery was barred by section 55 of the General Railroad Law of New Jersey (3 Comp. St. p. 4245 ; see foot note) ; and, second, that even if not barred thereby plaintiff was a licensee for whose injury through defendant's negligence the latter was only answerable if such negligence was wanton and wilful.
>
> "(1). The answer to the first question depends on whether a child playing at the locus in quo, with the implied consent of the defendant, and whose infancy is such that it cannot be charged with contributory negligence, falls within the provisions of such statute. Prior to the passage of this statute, the law was settled that a child of such tender years as to be incapable of discerning danger or of exercising sufficient care for its own safety could not be held guilty of contributory negligence. 1 Thompson's Commentaries on the Law of Negligence, § 303. It follows, therefore, that if this statute is held to be simply declaratory of the pre-existing law the word 'person' must be held to include such infants only as in law may be guilty of contributory negligence. On the other hand, if the statute is held to impose on such immature infants the burden of contributory negligence, it is a non-remedial, and in its effect well nigh a penal, statute. If, then, two constructions of this statute are possible, one

that the statute was simply declaratory of the humane principles of the common law, the other depriving children of these common-law rights, it would seem clear that, unless constrained by express and unquestionable language, the former construction should prevail, for:

" 'Where a statute is equally susceptible of two constructions, one of which is harmony with a settled principle of the common-law and the other in derogation of it, the courts will adopt the former.' " *Ryan v. Couch,* 66 Ala. 244.

And as was further said in Maxwell's interpretation of Statutes, 96:

"It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because, in their widest and perhaps natural sense, they have that neaning, would be to give them a meaning in which they are not generally used."

The rule on this subject is well stated thus by Black on Interpretation of the Law, § 313:

"Statutes in modification or derogation of the common law will not be presumed to alter it further than is expressly declared, or further than may be fairly and reasonably inferred from the purpose and nature of the statute or from the language employed in it. Such acts will be liberally construed, if their nature is remedial, but their operation will not be extended for a forced construction. The presumption is that the terms of the statute disclose the extent of the alteration or change it was desired to affect."

"Tested by these standards, it seems to us that a clear purpose, expressed in indisputable terms, to change the existing law in reference

to immature children, is not found in this statute. If such an intent exists, it exists alone in the use of the comprehensive word 'person'. But the contention that such meaning should be given that word is met by the fact that, in view of the nonremedial and restrictive effect of this law on prior beneficient rights, no such broad use of the word 'person' should be given it in the absence of any expressed purpose that such was the intent of the Legislature. Indeed, this principle of interpretation had been emphasized in New Jersey prior to the passage of this act, where, in *State v. Norton,* 23 N. J. L. 40, it was said:

" 'It is a rule of exposition that statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced, for if Parliament had had that design, it is naturally said they would have expressed it. Dwarris on Statutes, 695.' "

In the same case, referring for support to 1 Blackstone, Commentaries, 89, it was said:

> "When the common law and a statute differ, the common law gives place to the statute, only when the latter is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative."

We submit that the opinion of the United States Circuit Court of Appeals gives the true interpretation of the statute.

FINALLY.

For the foregoing reasons the petition for a writ of certiorari should be denied.

JAMES J. MURPHY.
Attorney for Defendant-in-Error.

EDWIN F. SMITH,
SAMUEL GREENSTONE,
Of Counsel.

29

Office Supreme Court, U. S.
MAR 25 1918
CLERK.

No. 846

In the

Supreme Court of the United States

ERIE RAILROAD COMPANY

Prosecutor

vs.

EDWIN J. HILL, Jr., by next friend, and EDWIN J. HILL, Sr.

Respondents

MOTION TO PLACE ON SUMMARY DOCKET AND AFFIDAVIT

JAMES J. MURPHY
Attorney for Respondent

Tel. 1697 Worth THE WERNHAM PRINT 38 Rm St., N. Y.
—1918—

Supreme Court of the United States

ERIE RAILROAD COMPANY, *Prosecutor,* *vs* EDWIN J. HILT, JR. by next friend, and EDWIN J. HILT, SR., *Respondents.*	On Certiorari. Motion to Place on Summary Docket.

Respondent, Edwin J. Hilt, Jr., moves the court to place this cause on the Summary Docket for the month of April, 1918. This case comes into this court on a writ of certiorari granted on the 11th day of March, 1918.

The only question involved is a single proposition of law, to wit, the construction of Section 55 of the Railroad Act passed by the Legislature of the State of New Jersey, Laws of 1903, page 673, as to the meaning of the word "person" in said Act, that is, whether or not it includes infants non sui juris, attracted to railroad property.

The case was tried in the District Court of the United States for the District of New Jersey, and resulted in a verdict for the infant plaintiff, Edwin J. Hilt, Jr. for the sum of $25,000. and in favor of the adult plaintiff in the sum of $1500. The defendant company applied for and obtained a Rule to Show Cause, and thereupon the court ordered that a new trial be granted as to the infant plaintiff unless all in excess of the sum of $10,000. be remitted. Consent to

such reduction was filed and judgment was duly entered for the sum of $10,000. in favor of the infant plaintiff and for the sum of $1500. in favor of the adult plaintiff. The defendant railroad then obtained a Writ of Error to the United States Circuit Court of Appeals for the Third Circuit, for the purpose of reviewing the judgment entered in the United States District Court for the District of New Jersey, for the sums above mentioned; which court after argument and upon filing of briefs, affirmed said judgment on January 5th, 1918.

The affidavit of Samuel Greenstone filed in support of this motion, sets forth the essential facts and reasons for the desirability of a speedy determination. A decision of this Court is of the utmost importance to infant plaintiffs who have been injured by railroads or upon railroad property and who have been attracted thereto, in the State of New Jersey. There is conflict of decision as to the construction of said statute between an inferior state court of the State of New Jersey and the United States Circuit Court of Appeals for the Third Circuit. Said Act has never been construed by the highest court of the State of New Jersey.

A notice of this motion has been given opposing counsel.

Dated, March 23, 1918.

Respectfully submitted.

James J Murphy

Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

TERM, 1918. No.

ERIE RAILROAD COMPANY, *Prosecutor,* *vs.* EDWIN J. HILT, JR. by next friend, and EDWIN J. HILT, SR., *Respondents.*	On Certiorari. Affidavit.

STATE OF NEW JERSEY, County of Hudson, City of Jersey City, } ss.:

SAMUEL GREENSTONE, being duly sworn according to law, on his oath, deposes and says; that he was the attorney for the respondents and tried said action for them in the District Court of the United States, for the District of New Jersey, wherein plaintiffs in said action recovered judgment against the defendant, (the prosecutor herein), for the sum of $25,000. in favor of the infant plaintiff and for the sum of $1500. in favor of the adult plaintiff therein. Said judgment as to the infant plaintiff was reduced to $10,000. and judgment was entered in favor of said infant plaintiff for the sum of $10,000. and in favor of the adult plaintiff in the sum of $1500. Thereafter, defendant railroad obtained a writ of error issuing out of the United States Circuit Court of Appeals for the Third Circuit, for the purpose of reviewing said judgment, which Court, after the hearing of argument and the filing of briefs thereon, affirmed said judgment of the said District Court of the United States for the District of New Jersey.

The action was brought for personal injuries sustained by the infant plaintiff by being run over by a freight car operated by the defendant railroad at Garfield, New Jersey, April 6th, 1916 and by the adult plaintiff (father of the infant) to recover damages for medical expenses and loss of services of his son during the latter's minority.

The petition for a certiorari issuing out of this Court is based upon the conflict of decision between an inferior court of the State of New Jersey and the United States Circuit Court of Appeals for the Third Circuit, involving the construction of Section 55 of said Railroad Act of the State of New Jersey. The question to be determined by this Court is of great public importance. Many of the great ralroads operating in the east have their terminals and pass through the State of New Jersey.

Deponent verily believes that the facts of this case are peculiarly adapted to a decision which will clarify the situation and will render much aid to the Bench, the Bar and the public, and because it is of such vital importance, a speedy determination would be advisable.

As a further reason for an early determination, deponent says that the infant respondent was injured on April 6th, 1916, and almost two years have intervened since which time he has been a helpless cripple, having lost one leg as the result of said accident, and because of the severity of his injuries, he will remain in that predicament for the rest of his life. Both plaintiffs are practically penniless and being deprived of the benefit of said verdict so awarded to them (if, it shall ultimately be determined that they are entitled to the same), is a great hardship.

Sworn to and subscribed this 23, day of March, 1918, before me } Samuel Green

Frances V Many
Notary Public of New Jersey

[redacted]

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I.

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Supreme Court of the United States

OCTOBER TERM, 1917,

No. 846.

ERIE RAILROAD COMPANY, *Petitioner,* *vs.* EDWIN J. HILT, JR., an infant, by next friend, and EDWIN J. HILT, SR., *Respondents.*	On certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF IN BEHALF OF ERIE RAILROAD COMPANY, PETITIONER.

I.

Statement of the Case.

This proceeding comes before the Court on a writ of certiorari allowed on March 11th, 1918, to review a judgment of the United States Circuit Court of Appeals for the Third Circuit, affirming a judgment entered in the United States District Court for the District of New Jersey in favor of the respondents (hereinafter called plaintiffs) and against the petitioner (hereinafter called defendant. The two plaintiffs were joined in the action by virtue of the provisions of "The Practice Act" of 1912 of the State of New Jersey

(see Chapter 231 of Pamphlet Laws of 1912, p. 377, Section 4). The action was brought by Hilt, Jr., to recover damages for personal injuries sustained by him on account of being run over by a freight car operated by the defendant at Garfield, in the State of New Jersey, on April 6, 1916, and by Hilt, Sr. (father of Hilt, Jr.), to recover damages for the medical expenses and the loss of services of his son during the latter's minority. The questions involved in the case were submitted to the jury for determination and a verdict was rendered for the sum of $25,000 in favor of Hilt, Jr., and for the sum of $1500 in favor of Hilt, Sr. The verdict of Hilt, Jr., was thereafter, on rule to show cause, reduced to $10,000 by the Trial Court and judgment was entered accordingly in his favor for that sum. The verdict of Hilt, Sr., was not disturbed on the rule and judgment was accordingly entered in his favor for $1500. After the affirmance of this judgment by the United States Circuit Court of Appeals for the Third Circuit the application of the defendant to this court for review by certiorari was duly granted.

The decision of the Circuit Court of Appeals is reported in 246 Fed. 800.

Questions Involved.

1. A boy six and a half years of age was playing near some freight cars which were standing on a railroad siding, on the private property of the railroad company, adjacent to the main line tracks. Children had been accustomed to play at and near this siding and the cars that might be thereon for some years prior to the accident. This custom was known to some of the defendant's employes who, at various times but

not always drove away any children who were found playing at that point. The boy was injured by the moving of a freight car under which he had placed his foot for the purpose of removing one of his marbles which had rolled thereunder in the course of his play. The movement of the car was caused by the backing of a freight train which a few minutes prior to the accident had moved along the adjacent main line track and had then backed in on the siding for the purpose of coupling on to some of the cars standing thereon. It appeared without dispute that while this train was moving along the main line track and before it backed into the siding one of the brakemen jumped therefrom and walked from one side to the other of the siding through an opening between the cars standing thereon, and made an observation the full length of the siding in each direction and on each side of the cars to see if anyone was on or near the siding or cars before giving the signal for the train to back; this brakeman saw no one and then proceeded along a driveway which was adjacent to the siding and turned a switch leading from the main track into the siding and gave the signal for the train to back. As the train backed the brakeman ran along the main line track ahead of the rear car of the backing train, having a view the full length of the siding on one side; he saw no one. The conductor of the train was standing on top of a box car at about the middle of the train for the purpose of passing signals to the engineer. He was facing in the direction in which the train backed and had a view of both sides of the cars that were on the siding, except that the overhang of the cars prevented him from seeing anyone who might

be very close to the standing cars. He continued to look in the same direction up to the moment of the accident and saw no one on or around the siding or the cars thereon. Neither the brakeman nor the conductor nor any other employe had any actual knowledge that the boy was playing near the siding. Under these circumstances, was there sufficient evidence of negligence on the part of the defendant's employes to require the trial court to submit to the jury the question of whether or not the employes exercised reasonable care in warning or looking for the boy before the train backed into the siding?

2. Under the circumstances above described, the boy having testified that he had been playing marbles for about an hour before the accident and a man who picked up the boy immediately after the accident having testified that he had seen the boy about five minutes before the accident and that at that time the boy was playing at a place about 180 feet distant from the point of the accident, was it legal error for the trial court to charge the jury that they would be justified if they believed the boy's testimony in inferring therefrom that either the brakeman did not look or that his looking was of such a cursory nature that he did not see the plaintiff and that therefore the jury might find negligence which would justify a verdict against the defendant.

3. Under the circumstances above described, there being no evidence of willful or wanton negligence on the part of the defendant or any of its servants or agents, should verdict have been directed in favor of the defendant? Was it error to refuse direction of verdict on this ground and to charge the jury that the duty of the defendant was to exercise reasonable care?

4. Under the circumstances above described, the boy having testified that he thought that the freight car was about to be moved (although he said that he had not seen the train as it proceeded along the main line track and as it was backing into the siding) and that he put his foot instead of his hand under the car to get the marble, because he was "afraid" that if he crawled under the car or reached under it with his hand to get the marble he would be "all smashed to pieces," was the boy chargeable with contributory negligence as a matter of law?

5. A statute of the State of New Jersey provides that if any person shall be injured by an engine or car "while walking, standing or playing on any railroad" such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful, public or private crossing (P. L. 1903, p. 673, Section 55). Under the circumstances above described, should verdict have been directed in favor of the defendant on the ground that the accident was due to a violation of said statute?

II.

Specification of Errors.

(Numbers correspond to the numbers of the assignments in the Transcript of Record.)

6. Said Court erred in denying the motion in behalf of defendant that the jury be directed to return a verdict for the defendant on the following grounds or one or more of them:

First. Because there was no evidence of any negligence on the part of defendant or of its servants or agents.

Second. Because the accident to the plaintiff Edwin J. Hilt, Jr., was due to his contributory negligence.

Third. Because the plaintiff Edwin J. Hilt, Jr., was a trespasser on the property of defendant and the defendant did not violate its legal duty to said plaintiff as such trespasser.

Fourth. Because the accident was due to contributory negligence on the part of the plaintiff Edwin J. Hilt, Jr., in walking, standing or playing on defendant's railroad.

Fifth. Because the accident was due to contributory negligence on the part of the plaintiff Edwin J. Hilt, Jr., in failing to take reasonable care to look, listen or otherwise inform himself of the approach of the train.

Sixth. Because of the plaintiff Edwin J. Hilt, Jr., was injured by an engine or car while walking, standing or playing on a railroad in violation of Section 55 of an act entitled "An Act concerning railroads (Revision of 1903)," approved April 14, 1903. (P. 221, l. 20.)

7. Said Court erred in giving the following instructions during the course of the charge to the jury:

> "Now, then, if they anticipated that children would be playing in and about those cars, there arose on their part a duty, so far as children of tender and immature years were concerned, to exercise ordinary and reasonable care to avoid injury. What might be reasonable care under one set of circumstances might not be reasonable care under

another and I am going to discuss that with you in just a moment. Now, if this boy had been a person of older years and mature judgment, if he had been an adult, then there would not have arisen on the part of the railroad company the duty to exercise ordinary and reasonable care to protect him, because, under those circumstances he would have been a trespasser on the property of the railroad company, and the duty which the railroad company would have owed him then would have been only the duty to refrain from acts wantonly and wilfully injurious. Now, you can readily see that if this boy had been an adult, under that rule, there would have been no liability in this case, because there is no evidence whatsoever to show that any employee of the company wantonly or wilfully did anything to injure this boy. But the boy, being of immature years and judgment and experience—being, I think, at the time of the accident, 6 years and five to six months of age—the railroad company owed to him a different duty, providing that they had reason to anticipate that he was likely to be there, and that was to exercise ordinary and reasonable care to see that he was not injured."

(P. 236, l. 30.)

8. Said Court erred in giving the following instructions during the course of the charge to the jury:

"But in this case there is evidence tending to prove and as I state, I think it is uncontradicted, that the frequency with which children went there was such that the railroad employees anticipated the presence of children at this point. Now, having defined what the duty was, namely, to exercise ordinary and reasonable care to see that those children were not injured by the movements of the trains to and fro, &c., you must find in

the case in the first instance facts from which you can say that that duty arose, namely, that the railroad company and its employees had reason to anticipate that children would be there. If you find that fact, then the duty, as a matter of law arises, and if you find that a duty existed, the next question is, was there a breach of that duty? Did they fail—did the company or its employees fail to exercise ordinary and reasonable care to avoid injuring children playing there."
(P. 236, l. 30.)

9. Said Court erred in giving the following instructions during the course of the charge to the jury:

"The evidence of the boy, on the other hand, is that he and his little companion had been playing marbles in about the same spot for upwards of an hour, before he was injured. Now, you would be justified, if you believe his testimony, in finding or inferring from it, that either the brakeman did not look, as he testifies that he did, or that his looking was of such a cursory nature that he did not see these little boys who, they say, were playing out in the driveway, but very close to one of the freight cars."
(P. 237, l. 5.)

10. Said Court erred in giving the following instructions during the course of the charge to the jury:

"Now, then, it has been suggested in the case that possibly, at the time that the brakeman looked, this little boy was underneath the car, not hiding, but endeavoring to get this marble that he says was under there; but on that phase of the case, I merely want to call your attention to just these facts, not for the purpose of suggesting to you how your verdict should be, or how you should

resolve those facts, but merely giving the facts to you, and letting you draw the inference from them that you will. The boy testifies that he had put his foot under there and was drawing the marble toward him, and had almost gotten it to the rail when the car moved and his foot was crushed. It would seem that if the boy's story is taken as correct, and he reached the marble just as soon as he put his foot under there, that a very short period of time must have elapsed from the time that he put his foot under the car, until his foot was crushed. Now, he says that prior to that time, that is when he put his foot under the car, he was playing marbles out in the driveway, but close up to the car. The brakeman testifies that almost six minutes were consumed from the time that he jumped off of the train to the time he went up and threw the switch. I think the conductor, it was testified that there was merely two minutes elapsed from the time he got the signal to move the train back before the back of the twenty cars which were attached to the engine came in contact with the five empty cars. Therefore there must have been some considerable period of time, comparatively speaking, between the time that the brakeman went through the cars and looked on the south side, until the time that the train actually came back in contact with the five cars that were there, then with the two coal cars. Now, then, the significance of that is this: If the boy's story is correct, that he just put his foot under and moved the marble, and then the train hit him, it must have been a very short period of time after he put his foot under before the train started moving back; and, if his story is believed, all the time prior to that he must have been out in full view. Therefore he must have been out there, if you believe his story, at the time that the brakeman went through, unless

it was he was actually hiding under the cars, or his story as to how long he was under there is not the true story. And, if you find that he was out there, you would be justified in finding that the brakeman did not look, or that his looking was not with the care that an ordinary prudent person would have exercised under those circumstances, who was endeavoring to ascertain the presence of anyone there, so as to avoid injuring that person by the movement of the train."

(P. 237, l. 5.)

NOTE—Assignments Nos. 1, 2, 3, 4 and 5 relative to the admission of certain testimony (p. 19, l. 36, to p. 20, l. 20) are not urged.

Assignments Nos. 11 and 12 relative to the refusal to charge certain requests (p. 238, ll. 1-20) are not urged, as the substance of these requests was charged.

Brief of the Argument.

I.

Verdict should have been directed in favor of the defendant on the ground that the evidence showed that the plaintiff, Edwin J. Hilt, Jr., was injured by a car while standing or playing on a railroad in violation of Section 55 of a statute of the State of New Jersey, entitled "An act concerning railroads (Revision of 1903)."

This section provides as follows:

"It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad,

or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

Pamph. Laws of N. J. of 1903, p. 673.
3 Comp. St. of 1910, page 4245, sec. 55.

History of the Statute and Construction thereof in New Jersey.

The second clause of this section beginning, "if any person shall be injured," was originally passed in 1869, and is known as Chapter 285 of Laws of that year (p. 806). It is entitled "An Act to Prevent Accidents on Railroads." It was re-enacted as Section 67 of "An Act respecting railroads and canals," approved March 27, 1874. (See Vol. II, General Statutes of New Jersey (of 1896) page 2680, Section 178.)

The first clause of the present section 55 is a re-enactment of the last clause of section 32 of the statute entitled "An act to authorize the formation of railroad corporations and regulate the same," approved April 2, 1873 (P. L. 1873, p. 88). As passed in 1873, this provision was incorporated with the provisions of the law relative to the construction and maintenance of fences and cattle guards. (See Vol. II, Gen. Stat. page 2646.)

When the revised Railroad Law of 1903 was passed, this clause was taken out of the section relative to fences, and put in its present position as the first paragraph of section 55.

(a) *The application of the statute is not limited to the main line of a railroad.*

The Act of 1869 was considered in *Diebold v. Penn. R. R. Co.*, 50 N. J. L. 478. In that case the plaintiff's intestate had gone into the freight station to transact some business with one of the railroad clerks. When next seen he was walking in the freight yard in company with an employe of the defendant, and a moment later while standing "on or near" the track of the railroad in the yard, he was struck by a freight car that was being shunted, and was killed. In referring to this statute the Court said (italics ours):

> "It is quite evident that Diebold's death was occasioned solely by his standing on defendant's railroad, in contravention to the plain provisions of this statute. Whether he was standing between the rails or beside them is immaterial. The language of the Circuit Judge in refusing the non-suit gives to this act its proper construction. 'I think,' he said, 'that the rule, with regard to standing on a track applies also to a man standing so near a track as to be struck by a car.'
>
> "The contention that this act applies only to the main tracks of railroads is not tenable. The express object of the statute is to declare certain actions as contributory negligence, *per se*, because of their obvious foolhardiness. It is evident that such conduct may take place at any point on a railroad and be more or less foolhardy. The act contemplates injuries not by locomotive engines alone, but by 'cars' or 'a car.' *The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selection for these purposes shall bar recovery for injuries thereby sustained.* Now, if the main track of a railroad, where all the proper appliances are provided, such as gates, flagmen and signals, where trains proclaim their approach by the ringing of bells and the blow-

ing of whistles if this be a place of admitted danger, how much more so is the privacy of a drilling yard, where employees, alive to the dangers of their calling, are alone admitted, and where no system of precautionary signals is enforced or required. The greater the imprudence, the more aptly does the statute apply" (p. 480).

The foregoing decision was by the New Jersey Supreme Court. It was cited with approval by the highest court of the State (Court of Errors and Appeals) in the cases of *Phillips v. Library Co.*, 55 N. J. L. 307, at page 315; and *Furey v. N. Y. Central R. Co.*, 67 N. J. L. 270, at page 274.

(b) *The statute does not apply in a case where the plaintiff was passing from one side of the track to another through an open space between cars.*

The statute is referred to in *Furey v. N. Y. C. &c. R. R. Co.*, 67 N. J. L. 270, where the N. J. Court of Errors and Appeals said by way of dictum, that the statute did not apply to the case then under consideration, for the reason that the plaintiff was *crossing* the tracks, and was neither walking nor standing nor playing on them (p. 278).

(c) *The clause as to jumping on or off a car while in motion bars recovery for any injuries thereby sustained.*

The act was again referred to in *Powell v. Erie Railroad Co.*, 70 N. J. L. 290, where the New Jersey Court of Errors and Appeals held that under this statute, a person injured while jumping on or off a train in motion was guilty of contributory negligence as a matter of law. Judgment of non-suit sustained.

(d) *The statute applies to all persons without distinction as to age.*

In *Barcolini v. West Jersey &c. R. R. Co.*, 82 N. J. L. 107, 81 Atl., p. 494, the plaintiff was twenty-one months old and was hit by a train while straying on defendants' tracks. The New Jersey Supreme Court in an opinion filed November 13, 1911, held that in the absence of proof of wilful negligence a verdict should have been directed for the defendant, saying:

> "This statute is a bar to recovery by any person who walks, stands or plays upon a railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned and applies to all persons alike, without distinction as to their age or physical or mental condition."

The case last cited did not reach the Court of Errors and Appeals of the State of New Jersey and hence the construction of the statute by the Supreme Court (not being the highest court of the State) is, of course, not binding upon this court. We submit, however, that this decision is correct. The original statute as shown above is entitled "An Act to prevent accidents on railroads." No logical reason can be suggested why it is not just as important to "prevent accidents" to minors as it is to persons of mature age. This statute either in its original form or as part of some other legislation (as shown above in the history of the statute) has been in effect in New Jersey for nearly fifty years. No doubt many cases have been tried at *nisi prius* in which the question of the application of the statute to minors must have been considered. But it is a remarkable fact that the question has not yet

been squarely passed upon by the Court of Errors and Appeals. It seems to have been taken for granted by the Bar of the State that the statute, as was stated by the New Jersey Supreme Court in the *Barcolini* case, "precludes any recovery for damages due to injuries received under the conditions therein mentioned * * * without distinction as to their age or physical or mental condition."

The use in the statute of the word "playing" indicates, we submit, a legislative intent that the statute should be applicable to children—at least to those who are old enough to "play," as that word is generally used with reference to children rather than adults. As pointed out by the New Jersey Supreme Court in the *Diebold* case, *supra,*

> "The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selection for these purposes shall bar recovery for injuries thereby sustained."

That case has received the approval of the highest court of New Jersey on two occasions as shown above (Phillips and Furey cases).

In the case of *Erie Railroad Co. v. Swiderski,* 197 Fed. 521, the court refers to the case of *Barney v. Hannibal etc. R. Co.,* 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847, in which the statute under consideration made it a misdemeanor for "any person, minor or adult, to climb," etc., "upon moving cars"; and then argued that this Missouri statute recognized the necessity of clearness of expression by using the words "any person, minor or adult." It is, however, to be noted that the Missouri statute does not use the word

"playing" or any similar language. In the absence of words which would commonly be understood as referring to children, it might well be thought necessary to specifically mention "minors" in order to include them within the meaning of the word "person," as used in the statute. But we submit that this argument does not apply to a case like that of the New Jersey statute where the very words themselves are broad enough to include children, and one of the important words is generally understood as applicable only to children.

In the *Swiderski* opinion the court also refers to the Bankrupt Law, wherein Congress added a legislative definition to make the word "person" include women. There may be some room for argument as to whether such a legislative definition was strictly necessary, but however that may be, it is of interest to observe that in the Bankrupt Act nothing was said as to whether the word "person" should include *minors;* nevertheless it has been held that a "minor" is a person within the meaning of the latter word, as used in that statute, providing that any person who "owes debts," except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt. *In Re Walrath,* 175 Fed. 243. The United States District Court for the Northern District of New York said in that case:

> "The law does not say 'any adult person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt,' but 'any person'; and until it can be demonstrated that an infant who owes a debt is not a 'person,' such infant is within the law and entitled to its benefits. Such infant is clearly included in

> the term 'any person who owes debts,' etc. It would have been just as easy for Congress to have said 'Adult persons who owe debts,' or 'Any adult person who owes debts,' and thus have excluded infants who owe debts, as to have used the language it did."

A case in the Court of Errors and Appeals of New Jersey in which the question of the application of Section 55 to trespassing children was considered in *Carleo v. Delaware etc. R. R. Co.*, 77 N. J. L. 607 (decided March, 1909). In that case the plaintiff was a child about two and a half years of age; he was picked up from the ground at a point alongside of or very near to a street crossing just after a train had passed. The opinion does not refer in terms to Section 55 but an examination of the briefs filed with the court shows that the defendant relied upon Section 55 as a bar to recovery. The court held that there was sufficient evidence to justify the jury in finding that the accident happened *on the street crossing*, and a verdict for plaintiff was therefore sustained, there being some evidence of negligence on the part of the company either in the management of the gates at the crossing or in the giving of the statutory signals of the approach of the train. Of course, under these circumstances it was not necessary for the court to pass upon the question of the application of Section 55 because that in terms provides that it shall not apply to the crossing of a railroad by any person at any lawful, public or private crossing. We suggest, however, that if the New Jersey Court thought that Section 55 was *not* applicable to a child of that age, it would have been unnecessary to discuss the question of whether the accident happened

on or off the crossing. The fact that the court found it necessary to pass upon the question of where the accident happened justifies the inference that Section 55 would have been held to be applicable *if* the accident had happened away from the crossing.

Another case in the Court of Errors and Appeals in which the point may have been considered, although it was not mentioned in the opinion, is *Tarlucki v. West Jersey etc. R. R.*, 86 N. J. L. 301. The plaintiff was a boy about eight years of age and was injured by coming in contact with the electrified third rail while he was passing from one side of the railroad to the other. A demurrer to the original declaration was sustained by the Supreme Court on the ground that the facts stated in the declaration showed a manifest trespass. See 80 N. J. L. 688. Thereafter an amended declaration was filed setting up that at the place where the plaintiff was injured there was an "ancient by-road." This declaration was sustained by the Supreme Court. See 82 N. J. L. 138. Thereafter the case came to trial and it was held that there was sufficient evidence to justify the jury in inferring that the plaintiff was crossing the track at a point which had been used by the public as a means of passage from one side of the road to the other for over sixty years. The inference from this opinion is that the plaintiff would have been barred of recovery *unless* there had been sufficient evidence to make it a question of fact for the jury as to whether or not he came within the exception of Section 55.

A recent case in the Court of Errors and Appeals is *Drelich v. Erie R. R. Co.*, 103 Atl. 189

(decided March 4, 1918). In that case the plaintiff's intestate was a child two years of age who was fatally injured by a railroad car on defendant's freight track in the City of Passaic. The court did not find it necessary to pass directly upon the question of the application of Section 55 for the reason that it came to the conclusion that there was sufficient evidence to require the submission to the jury of the question whether there was at the place of the accident a path open to and adversely used by the public for such preceding period of time, not less than twenty years, as would vest in members of the public the right to use it as a public way by prescription. The clear inference from this opinion is that the plaintiff would have been barred of recovery in the absence of evidence to prove such prescriptive right. This inference is strengthened by the remark of the court in disposing of the claim made in behalf of the plaintiff that Section 55 did not apply to a case where the accident resulted in death. On this subject the court said (italics ours):

> "It is claimed for the plaintiff that this statute does not apply to cases where the injury has resulted in death and the suit is by a personal representative. *We incline to the contrary view,* but it is unnecessary to deal directly with the point, as the case turns on other grounds; and irrespective of the statute the rule is settled that to a trespasser no duty of care was owing, but simply the duty to abstain from wilful injury, and there is no pretence that this rule was violated."

It may be uregd that the word "person," as used in Section 55, should not be held to be applicable to minors, and, indeed, it was so ruled in *Erie R.*

R. Co. v. Swiderski, 197 Fed. 521, at p. 524, where the court said (italics ours):

> "If Congress in enacting the Bankrupt Law felt constrained to add a legislative definition to make the word 'person' include women, it would seem reasonable to conclude that the Legislature of New Jersey did not mean to include under the word 'person' children so young as in law to be *incapable of contributory* negligence."

This argument might be sound so far as relates to children who, as a matter of law, are "incapable" of contributory negligence—although it is contrary to the ruling of the New Jersey Supreme Court in the *Barcolini* case, where the plaintiff was only twenty-one months of age; but we respectfully submit that there is room for distinction, so far as concerns the application of the statute, between those children who as a matter of law are incapable of contributory negligence and those who, as a matter of *fact,* might be held by a jury to be capable of contributory negligence, and properly chargeable therewith under the circumstances of the particular case. If the statute is construed to be applicable to the latter class, it amounts merely to a legislative declaration that under the conditions named in the statute the plaintiff shall be chargeable with contributory negligence as a matter of law; and it merely removes from the jury the right to determine, in that class of cases, whether the particular plaintiff is chargeable with contributory negligence as a matter of fact.

It is well settled that children of a certain age may be held chargeable with contributory negligence as a matter of fact—and indeed, under certain circumstances, *as a matter of law,*

without any statute at all upon the subject. For examples of cases in which children have been held chargeable with contributory negligence as a matter of law, see Point IV.

The power of the Legislature to prescribe that contributory negligence shall *not* bar recovery of damages for personal injuries is well settled. A summary of the cases will be found in *Sexton v. Newark District Telegraph Co.*, 84 N. J. L. 85; also in a note to the report of the decision of the New York Court of Appeals in the case of *Jensen v. Southern Pacific Co.*, L. R. A. 1916-A, p. 403, at p. 413 and following; also in the decision of this Court in *Second Employers' Liability Cases*, 223 U. S. 1, at p. 51; also *Brost v. Whitall Tatum Co.*, 99 Atl. 315. The cases cited are those where the defense of contributory negligence has been *removed* either in whole or in part. Illustrations of cases where the defense of contributory negligence has been *transferred* from the domain of the court to the province of the jury are found in the decisions construing the so-called "crossing statutes" of the State of New Jersey.

See:

Brown v. Erie R. R. Co., 87 N. J. L., 487, 91 Atl. 1023;

Fernetti v. West Jersey & S. R. Co., 87 N. J. L., 268, 93 Atl. 576;

Waibel v. West Jersey & S. R. Co., 87 N. J. L., 573, 94 Atl., 951;

Schnackenberg v. Delaware etc. R. Co., 98 Atl., 266;

Kratz v. Delaware etc. R. Co., 100 Atl. 208.

If the Legislature has power to abolish the defense of contributory negligence either in whole

or in part, or if it has power to enact that the question of contributory negligence shall in certain cases be one of fact for the jury rather than of law for the court, no logical reason can be suggested why the Legislature has not also the power to declare what shall constitute contributory negligence, which would bar recovery as a matter of law.

The power of a Legislature to enact, without reference to the age of the persons affected thereby, a statute, such as Section 55, being clear, the further question is whether the Legislature of New Jersey did so enact when it passed Section 55 and its similar preceding statutes. As shown above, the Supreme Court of the State of New Jersey, in the *Barcolini* case, held that the statute applied to all persons without distinction as to age or physical or mental condition. Similar statutes in other States have been similarly construed. Thus, in the State of New York, there is a statute known as Section 53 of the Railroad Law, which reads as follows:

> "No person other than those connected with or employed upoon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same."

In the case of *Butler v. New York Central R. Co.*, 152 Fed., 976, the Circuit Court of Appeals for the Second Circuit held that the statute applied to the case of a girl 16 years of age, who was struck by a locomotive while walking along the railroad, in violation of the statute. A direction of verdict for the defendant was affirmed the court saying:

"The evidence does not warrant a finding that the engine driver was reckless or grossly negligent in running his train along the path upon which a person was walking at a safe distance from the rails, nor in failing to anticipate that, when the semaphore was reached, the deceased would, without any glance behind to see what the conditions were, step from a position of safety to one of deadly peril."

In *Holmes v. Delaware & Hudson Co.*, 112 N. Y. Supp. 421, 128 App. Div. 24 (see also 113 N. Y. Supp. 1134), plaintiff, a boy of 16 years of age, was walking along the tracks of defendant and found a railroad torpedo. He tried to open it and was injured by the resulting explosion. Judgment for plaintiff was reversed, the court saying:

"The claim of the plaintiff rests upon the assumption that the defendant invited, enticed or allured him to come upon the railroad tracks. The claim is not tenable. The plaintiff was not invited upon the railroad tracks in any sense further than that the defendant had not taken occasion to prevent the public from using them as a footpath * * *. Indeed, one of the statutes of the state provided that:

"(Quoting Sec. 53).

"Under such circumstances, the plaintiff was there by sufferance only, and the company did not owe him the duty of active vigilance to see that he was not injured while upon its land for his own convenience."

The New York Court of Appeals, in *Keller v. Erie R. R.*, 183 N. Y., 67, 75 N. E., 965, referring to this statute, said:

"An act expressly prohibited by the public statute is, in its inception and always must continue to be unlawful. The defend-

ant's powers and capacity to act are defined and controlled by statute law, and, as a creature of statute, it could, neither expressly nor passively, confer a right which the statute denies. Whoever walks upon, or along, the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the law and is like a trespasser, and the company's servants are under no other obligation than to refrain from willfully, or recklessly, injuring him."

While it is true that the last cited case was not that of a minor, the language if the New York Court of Appeals in construing the statute is broad enough to apply to all persons, regardless of age.

To the same effect see the case of *Marra v. New York Central R. R.*, 139 App. Div., 707, 124 N. Y. Supp. 443.

In *Colston v. Boston & Maine R. R.*, 99 Atl. 649 (N. H.), a statute provided as follows:

"Section 1. If any person shall without right enter upon or remain in any right of way, tracks, yard, station ground, bridge, depot, or other building of any railroad, when notice has been posted forbidding such trespass, he may be fined not exceeding twenty dollars; and no right to enter or be upon any railroad track shall be implied from custom or user however long continued.

"Sec. 2. If any person shall be injured while engaged in any act prohibited by section 1 of this act, neither he nor his executor or administrator shall have any cause of action against the railroad company * * * arising from such injury unless the injuries are occasioned by the willful or gross negligence of the railroad or its employees."

Held that under this statute a trespasser upon the railroad tracks was not entitled to recover

in the absence of proof that the injuries were caused by willful or gross negligence. The report does not show whether or not the plaintiff was a minor.

The same statute of New Hampshire was considered in the case of *Nappi v. Grand Trunk Ry. Co.*, 99 Atl. 185, and was held to be applicable to a trespassing child who, at the time of accident, was about four years of age. The court said:

> "The plaintiff's intestate was a trespasser upon the railroad tracks when he was killed. The fact that he was an infant makes no difference."

In *Barney v. Hannibal &c. R. R. Co.*, 126 Mo., 372; 28 S. W. 1069, 26 L. R. A. 847, the plaintiff was not quite six years of age. He was injured while stealing a ride on a car, caused by slipping from the car and the wheel running over his foot. A statute of the State made it a misdemeanor for "any person, minor or adult, to climb upon, hold to, or in any manner attach himself to, any locomotive engine or car while the same is in motion, or running into or through any city or town in this State." The plaintiff's attorney claimed that this law did not apply to "babies," but the Supreme Court of the State of Missouri said:

> "While the law may not apply in a criminal proceeding to a child of very tender years, yet still, for the purposes of a civil action, the consequences of the unlawful act must be the same as in the case of an infant, even of very tender years, as in the case of an adult."

In *Kapernaros v. Boston & M. R. R.*, 99 Atl. 441 (Me.), a statute provided as follows:

> "No railroad corporation shall be liable

for the death of a person walking or being on its road contrary to law." R. S. c. 52, §76.

"Whoever without right, stands or walks on a railroad track forfeits not less than five, nor more than twenty dollars, to be recovered by complainant." Id. §77.

The court held that this statute was applicable to the case of a trespassing child "slightly less than two years old."

II.

Verdict should have been directed in favor of the defendant on the ground that there was no evidence of negligence on the part of the defendant or any of its servants or agents.

The specific allegation of negligence upon which the plaintiffs relied was that the defendant, well knowing that children, particularly the plaintiff, were playing upon the roadway, ran a certain engine or cars into the siding "without warning said children, and particularly the plaintiff, of the approach thereof" (see Record, p. 3. l. 10). The trial court charged the jury that the defendant was not bound to fence the property in question, but that nevertheless it was required to exercise reasonable care, "when its servants were going to move trains, to ascertain that children were not in a position where the movement of trains on that switch track would inflict injury upon them, and give them warning, if children were there, in such a position that their presence would undoubtedly result in injury by the movement of the train—give them warning to get away and thereby avoid it" (p. 227, ll. 1-10). On the issue of negligence on the part of the defendant or its servants

the case is narrowed down to the single question of whether there was sufficient evidence to justify the jury in finding that the defendant did not exercise reasonable care in looking for the plaintiff, Hilt, Jr., on or near the siding and in warning him of the movement of the train by which he was run over. The fundamental question is whether there was any duty on the part of the company's servants to look for or to warn children who might be playing on or near the tracks. In considering this question it must be remembered that the accident did not happen on or near a public street but on the private property of the railroad; in one direction the nearest street (Hobart Place) was about 400 feet fom the scene of the accident and in the other direction the nearest street (Bogart Avenue) was about 60 feet. The theory upon which the plaintiff's complaint was based, and the ground upon which the trial court permitted the jury to find the existence of a duty on the part of the defendant to watch for children and to warn them of the movement of trains upon the sidetrack, was that for several years prior to the accident children had been accustomed to play on and about the siding and the cars placed thereon. It is but fair to say that there was evidence from which the jury might be justified in finding that children were accustomed to play in that vicinity and that the defendant's servants had knowledge of that fact. See evidence of Hilt, Sr. (p. 13, l. 10); of Maitland, police officer (pp. 37-39); of Simoldoni, teamster (p. 45); of Vitale, real estate agent (pp. 57-58); of Norman Farrell, boy of 15 (p. 73); of Mrs. Farrell (p. 83); and of Brown, police officer (p. 112). The company and its servants did not recognize the right of children to trespass upon its property, but on the contrary frequently chased them away. See evidence of Maitland (p.

39, l. 20; p. 42, l. 10); of Simoldoni (p. 47, l. 10; p. 50. l. 15); of Vitale (p. 59, l. 20); and of Farrell (p. 77, l. 10); also of Dougherty, station agent (p. 178, ll. 30-35; p. 181, l. 5); of Wiser, chief clerk at Garfield station (p. 185, l. 10); of Holmes, section foreman (pp. 186, 7).

It was a practical impossibility to keep all children away from the tracks—indeed, the evidence of the police officers of the Borough of Garfield indicates that they considered it useless to try to keep children off of the defendant's premises—at any rate they apparently never made any serious attempt to keep them away.

Under the cases of *Snare & Triest Co. v. Friedman,* 169 Fed., 1, and *Erie R. R. v. Swiderski,* 197 Fed. 521, it may be that under these circumstances a duty rested upon the defendant to exercise reasonable care to look for and to warn children. But assuming such to be the law, the further question still remains as to whether or not there was any violation by the defendant of its duty to watch for or to warn children. Certainly the defendant was not the insurer of the safety of children who might trespass on its property, in violation of the laws of the State; at most its duty was to exercise reasonable care—and the trial court so charged. We come, therefore, to the question of whether the defendant's servants did exercise reasonable care in looking for children who might be near the track and the cars that were standing on the siding.

Before taking up in detail the evidence of the several witnesses, it will be convenient to have in mind the general situation with respect to the railroad tracks and the location of the several freight cars thereon, and the movements of the freight train and the actions of the members of the train crew in connection therewith.

At and near the point where the plaintiff was injured there were two main line tracks, one known as the westbound track, on which were operated trains from Jersey City, the other as the eastbound track on which were operated trains to Jersey City. On the southerly side of the eastbound track was a switch known as the "local siding," which was used for the receipt and delivery of freight to and from cars that might be standing thereon. This siding extended from a point some distance to the east of a street known as Hobart Place, in a westerly direction adjacent to and parallel with the eastbound track; the freight house was located about thirty feet west of the westerly end of the siding. To the south of and adjacent to the siding there was a driveway, about twelve feet wide, which extended from Hobart Place in a westerly direction for a distance of about three hundred and fifty feet. This was used as an approach to the freight house and to any cars that might be on the siding. A street known as Bogart Avenue intersected Hobart Place some distance to the south of the railroad tracks and ran thence in a northwesterly direction, almost parallel to the siding and at a distance varying from about one hundred and sixty feet to about fifty feet southerly therefrom, to a street known as Passaic Street, which crossed the tracks at a distance of about seven hundred feet westerly from Hobart Place. From the northerly boundary line of Bogart Avenue there was an open space or driveway which was also used as an approach to the siding and freight house. On the southerly side of the first named driveway there was a fence which began at the westerly line of Hobart Place and extended in a westerly direction for about three hundred and fifty feet, where it turned at right angles in a southerly direction for a dis-

tance of about seventy feet to the northerly line of Bogart Avenue.

Immediately prior to the time of the accident there were cars standing on this siding as follows:

(a) Two loaded box cars about thirty feet east of the westerly end of the siding;

(b) Two loaded coal cars the westerly end of which was about fifteen feet east of the easterly end of the loaded box cars;

(c) Five empty box cars the westerly end of which was about fifteen feet east of the easterly end of the coal cars.

An eastbound freight train with about twenty empty box and coal cars moved in an easterly direction along the eastbound track to a point some distance to the east of Hobart Place and was backed into the siding for the purpose of picking up the five empty box cars. As this train moved east along the eastbound track the rear brakeman jumped off from the third hind car on the southerly side of the train (between the eastbound track and the siding) and walked through the open space between the two coal cars and the five empty box cars that were standing on the siding. After jumping off the train and crossing the siding he was then on the driveway. He looked up and down both sides of the track in each direction, the full length of the siding, and saw no one. He then ran down the driveway in an easterly direction toward Hobart Place and threw the de-rail so that the train could back into the siding; in the meantime the train had been proceeding easterly and had come to a stop with the hind end about fifty feet east of the point of the switch leading into the siding. The brakeman threw the switch for the siding and gave the conductor the signal to back. He then ran along the eastbound track two or three car-lengths ahead, or west, of the rear

end of the train to the point where the coupling was to be made at the five empty cars. As the brakeman ran along the eastbound track he had a view on the northerly side of the siding as far as the westerly end thereof, but he saw no one. On reaching the point opposite where he had dropped off from the train he stood at about the center of the five empty cars waiting for the coupling to be made. About six or seven minutes elapsed from the time he had dropped off up to the moment when the coupling was made. The engineer, in accordance with signals given by this brakeman to the conductor and thence passed on to the engineer, backed into the siding and against the five empty cars.

When the train started to back from the eastbound main track into this siding the conductor stood on top of a box car at about the middle of the train in order to receive the signals from the rear brakeman who was standing on the ground as above stated. He faced in a westerly direction, that is, the same direction, in which the train was moving. He was watching the siding and the brakeman as the train moved back, and saw no one around except the brakeman. The train backed in at the rate of about four or five miles an hour and the usual stop signal was given and the brakes were applied in the usual way; the coupling was made between the rear of the train and the nearest box car, but on account of the momentum of the train and the taking up of the "slack", the five empty cars were pushed back about fifteen feet against the two coal cars that stood to the west, and after striking the coal cars all the cars moved about five feet further.

The plaintiff Hilt, Jr., had been playing marbles near the siding. There was no eye-witness, ex-

cept a youthful companion of the plaintiff, who was not called as a witness. The first man to know of the accident was a peddler who was selling potatoes to one of the residents of a house located on the other side of the fence. He had seen the boy about five minutes before the accident; at that time the boy was playing about twenty-five or thirty feet east of the freight house and between the freight house and the westerly end of the switch. The peddler told the boy to get away or he would be hurt, but did not stop to see what the boy did, and went on selling his potatoes. About five minutes later the peddler heard the coupling of cars, and just after that the "hollering" of the boy and he jumped over the fence and found the boy lying on the ground on the south side of the switch and about a foot from the rail. At that time the train was standing still, alongside of the boy. He picked the boy up and held him about four minutes and then turned him over to one of the train crew, who took the boy to the station, whence he was removed to the hospital. The place where the boy was picked up was about sixty feet west of the northwest corner of the fence adjacent to the driveway and about one hundred and fifty feet east of the westerly end of the siding.

The boy said he had been playing marbles for about an hour before the accident and that one of them rolled under a car towards the other side of the track (meaning the northerly rail of the siding). He reached under the car with his foot. To do this he had to get all the way under the car. He caught it with his foot and pulled it towards him and "quick got out" and then put his foot under the car the second time to get the marble, saying that he thought that if the reached after

the marble with his hand instead of his foot he "might get all smashed to pieces," because he thought the train was going to move right away. The train did move and his foot was run over. At the time of the accident the boy was forty-four inches tall. The distance between the rails of the siding was the standard gauge of fifty-six and a half inches.

The first knowledge that any of the defendant's employes had of the accident was when the rear brakeman was told by the peddler that somebody had been hurt. None of the crew had seen the plaintiff or anyone else at or near the cars on the side track at the time the train backed in.

The foregoing summary of the evidence is without any substantial dispute and we therefore urge that as a matter of law there was no evidence to go to the jury with respect to the defendant's negligence. The only witness as to the circumstances of the accident was one of the plaintiffs, Hilt, Jr. Another boy was present at the time of the accident but was not called as a witness. Hilt, Jr., said that he had not seen any railroad men before he was hurt and that he did not hear anybody say anything or "shout" before he was hurt (p. 102, ll. 20-30). This evidence is not very persuasive, as he also said that he did not "look around" at all to see whether there was anybody there (p. 103, ll. 1-10); and he also said that he did not see the train back in (p. 104, l. 5) and he did not even see or hear the train come along the track next to the siding a short time before the accident (p. 106, ll. 20-40). But nevertheless *he thought that the car was about to be moved.* This is made evident by his testimony, from which we quote as follows:

> "Q125. Were you afraid your hand would get run over? A. Yes.

"Q126. What made you afraid that your hand would get run over? A. I don't know.

"Q127. You were afraid the car might move and run over it, weren't you? A. Yes, sir.

"Q128. That's right, isn't it? A. (Nods yes).

"Q129. And you thought you would rather have your foot run over than your hand, is that it? A. Yes, sir.

"Q130. Well, why did you think your hand might be run over? A. I don't know.

"MR. GREENSTONE: If your Honor please, he has already answered the question twice.

"THE COURT: I think I will let him answer that.

"Q131. Why did you think your hand might be run over? A. I don't know.

"Q132. What? A. I don't know.

"Q133. Why didn't you crawl under the car and reach it with your hand, reach this marble with your hand instead of with your foot? A. I might get all smashed to pieces, that's what I thought.

"Q134. You were afraid you might get all smashed to pieces if you went under the car? Well, you were under the car, weren't you, when you first went under to reach with your foot? A. Yes, ma'am.

"Q135. Weren't you afraid you would get all smashed to pieces when you went under the car at first? A. No that was the second time, then I got afraid.

"Q136. You got afraid the second time but you weren't afraid the first time, is that it? A. Yes. ma'am.

"Q137. Why were you afraid the second time and not the first time? A. Because I thought the train was going to move right away then.

"Q138. You thought the train was going to move right away? A. Yes.

"Q139. And that's why you just struck your foot under the second time instead of reaching way under the way you did the first time? A. Yes, sir.

"By The Court:

"Q140. What made you think, Eddie, the train was going to move right away? A. All the cars, Mr. Murphy took with his truck and some other truck came and took some of it out the other cars.

"Q141. That's while you were there? A. Yes. Then they had to get some other cars and I was afraid of getting all smashed to pieces because I thought they was going to move right away to get the cars that's full in.

"Q142. You thought the train was going to move right away? A. Yes, and get the other full cars instead of the empty cars.

"Q143. And what made you think that the train was going to move right away? A. To get the empty cars away and get the full cars there.

"Q144. Did you see any engine there? A. No.

"Q145. Well, how did you think the train was going to move without an engine? A. Well, I thought they was going to go faster in back of them, I couldn't tell.

"Q146. You knew that a train couldn't move without an engine, didn't you? A. Yes, ma'am.

"Q147. And you didn't see any engine there? A. No.

"Q148. Did you or didn't you see the engine? A. I didn't see no engine at all.

"Q149. Then why did you think the train was going to move? A. I don't know.

"Q150. When you put your foot under the train were you afraid that your foot would get hurt? A. No.

"Q151. Why weren't you afraid your foot would get hurt when you put it under the train? A. Because I can pull it out quicker" (p. 109, l. 5 to p. 111, l. 10).

If the boy told the truth in saying that he thought he "might get all smashed to pieces" if he reached under the car after his marble, and that he was afraid the train was going to move to

get the full cars away, then it necessarily follows that no negligence could be charged against the defendant's servants in failing to warn him of a danger which, according to his own evidence, he fully understood and appreciated. In other words, *under those circumstances there would be no duty to warn him.* No warning that might possibly have been given could have impressed upon him the danger of the movement of the car any more forcibly than his own thought in regard to same.

The evidence of the defendant showed without dispute that its servants did in fact exercise reasonable care in looking for children who might be playing on or near the siding.

The defendant's evidence on this subject was given by the engineer, fireman, conductor, flagman and brakeman, and may be summarized as follows:

Schiesswohl, engineer. Ran through Garfield on the eastbound track; and went about ninety or one hundred feet beyond the siding; the train at that time was moving about ten miles an hour. Had twenty cars. When train stopped last car was about ninety feet east of the switch point leading into the siding. Backed into switch at about four miles an hour, took signals from brakeman who was on top of a box car—second or third car from engine. Bell was ringing as train moved past the siding. Received the signal to back from Brakeman Conkling (now in the United States Army) and backed the train. Then received a stop signal and a moment or two afterwards a signal to go ahead. After receiving stop signal train moved about twenty feet before it came to a full stop. Was sitting in righthand side of the cab and could see the switch point but could not see "along" the siding. Noticed the cars on the siding as train went by and observed one opening

between them. Total distance that train moved when backing up was seven or eight hundred feet. The air brakes were released when train came to a stop before backing up, and made the usual noise of the hissing of escaping air before starting to back. The signal to stop as train moved into the siding was a "gradual" signal and stop was made the same as usual; "it was a sort of a medium stop" (pp. 129-140).

Coyle, fireman. When train moved along the eastbound track past the siding and backed into the siding, was engaged in attending to the fire. Train came to a stop and started to back into the siding in about five minutes. Train backed in slowly about four or five miles an hour. As train backed was standing between the fire box and the tank of the engine. Train made the usual noise as it moved along the track and as it backed up; there was also the usual noise of the "releasing brakes" (pp. 144-4).

Madigan, conductor. Had placed some cars on the Garfield siding in the morning of the day when accident happened; there were two box cars on the siding about thirty feet from the westerly end; then there was a space of about fifteen feet; then two coal cars, then another space of about twelve or fourteen feet and then five empty cars which were to be picked up in the afternoon. Arrived at Garfield about two o'clock train ran along the eastbound track for a distance of about fifty or sixty feet beyond the point of the switch leading into the siding. Train came to a stop and stayed there about five minutes. At that time Madigan was on top of a box car in about the middle of the train (p. 147, ll. 30-35); also stood on this same car as train moved along the eastbound track past the siding (p. 148, l. 5). Watch-

ed the rear brakeman (Pruner), and saw him drop off the train near the two coal cars. After about five minutes received a signal from this brakeman to back up, and when train was near the cars on siding gave the engineer and the head brakeman the signal to stop. The train stopped in five or ten seconds thereafter, moving about twenty or twenty-five feet (p. 148). Train backed in at the rate of four or five miles an hour. As it backed Madigan was standing on top of the same box car. Did not see any children around the siding; rear brakeman in the meantime had gone back towards the empty cars, walking on the north side (p. 149, ll. 20-30). The cars made the usual "rattle." Train struck against the five empty box cars and made the coupling and these five cars in turn moved back against the coal cars and moved the latter five or six feet. This was due to the "slack" of the train (p. 151, ll. 1-30). As train moved along the eastbound track and as it backed into the siding, Madigan was facing west all the time. After the rear brakeman dropped off saw him go through the opening between the five empties and the two coal cars and then saw him at the east end of the empty cars. The brakman did not come back through the opening but remained on the south of the siding and then came up and opened the switch; after opening the switch he gave the back-up signal (p. 152, l. 20). Madigan remained on top of the box car and passed the signal to head brakeman Conkling and he in turn passed it to the engineer (p. 153, l. 15).

After giving the stop signal train stopped in half a minute or less; the slack ran out at about fifteen feet. Was looking at the siding as the train backed, but did not see any children; vision was not obstructed by the cars standing on the switch. Could not see children if they were hiding but could

see them if they stood a couple of feet away from the car (p. 154, ll. 1-20). Looked alongside of the cars to see if there were any children or wagons or teams (p. 56, ll. 30-40). Was paying strict attention and watching the brakeman and for children or whatever might be "against that switch," same as is done every day (p. 157, ll. 10-20).

First time he knew there were any children there was when he noticed the brakeman run around the cars. Previous to that had seen no children. When train moved along the eastbound track looked on the righthand side (this would be the southerly side) of those cars to see if there was anybody there (p. 158, ll. 1-10).

It was about three minutes from the time the rear brakeman jumped off until the train backed in (p. 159, ll. 1-20). Witness then indicates with a circle on Exhibit D-1 the point where the rear brakeman jumped off (p. 159, l. 30).

> "Q. Why did he stop off here when the switch was up here? A. For the purpose of not backing up to that switch until he knew there was no wagons or people standing there against the cars" (p. 159, l. 35, to p. 160, l. 3).

Devoe, flagman. While train was proceeding to Garfield was out with the flag at Dundee. Followed the train up and at about two o'clock (the approximate time of the accident) was near the Garfield station. When the train started to back into the siding was about two hundred feet west of the station. Was standing on the main track in order to protect the train from other trains coming on the eastbound track Saw a man hurrying towards the train and saw him pick up a boy. This was about two minutes after the train had backed into the siding. The man who

picked up the boy handed him to the witness and the latter took him to the station for medical aid and then the boy was taken to the hospital in the ambulance. At the time the train came to a standstill on the siding and before it had started to pull out, the rear brakeman (Pruner) was on the eastbound track near where he had made the coupling; he had to make a cut behind the five empty cars in order to separate them from the two coal cars. Had a "clear line of vision" but could not see on the southerly side of the cars (pp. 161-173).

PRUNER, rear brakeman. As train approached Garfield on the eastbound track was riding on the third hind car (p. 190, l. 22). As train proceeded past the siding dropped off in the space between the five cars and the two coal cars that were on the siding (p. 191, ll. 1-20). This space was about fifteen feet (p. 191, l. 28). Dropped off the train on the southerly side, between the switch and the eastbound track and went "right through" the space.

> "Q39. And then what did you do, you say? A. I went right through that space of fifteen feet, between the two coal cars and the five empties. I looked up and down the track both ways.
>
> "Q40. That is, after you went through between the two empties and the two coal dumps? A. Yes, sir.
>
> "Q41. You were then on the southerly side of the siding? A. Yes, sir.
>
> "Q42. And when you got to the southerly side of the siding, in between the two empties and the two coal dumps, what did you do? A. I was on the driveway, I looked up and down the track, both ways.
>
> "Q43. Did you see anybody? A. No, sir.
>
> "Q44. See any children? A. No, sir.
>
> "Q45. How far could you see up and down

the siding? A. Practically where I stood I could see the full length of the switch.

"Q46. Could you see all the way down to the westerly end of the siding? A. Yes, sir.

"Q47. And could you see as far as the freight house? A. Yes, sir.

"Q48. Then what did you do? A. I ran all the way down that driveway.

"Q49. Toward what street? A. Towards Hobart place, east.

"Q50. Then what did you do? A. Throw the D-rail.

"Q51. D-rail where? A. On the switch, D-rail on the siding.

"Q52. That is the siding shown on the map? A. Yes, sir.

"Q53. Why did you throw the D-rail? A. Well, I have to throw that on so we could back in.

"Q54. Where was your train standing when you threw the D-rail? A. On the eastbound track.

"Q55. How far was the hind end of your train from the point of the siding? A. Well, I should say about twenty-five or thirty feet, maybe.

"Q56. Well, what did you do? A. Run down, throwed the main track switch.

"Q57. Main track switch? A. Leading in the siding.

"Q58. Was your train standing still or moving at that time? A. Standing still.

"Q59. Then where did you go? A. After I throwed the main track switch for the siding, I stepped right across the eastbound track, and give the conductor the signal to back up.

"Q60. What did you do then? A. Run back towards five cars that we were going to couple on.

"Q61. Where were you when you ran back, between what tracks? A. On the eastbound track.

"Q62. As you ran back, were you ahead of the hind end of your train? A. I was ahead of the hind end of my train, yes, sir.

"Q63. About how far? A. Oh, I should say a couple, two or three car lengths.

"Q64. How far did you run back along the eastbound track? A. Back to just about the point where the coupling was to be made.

"Q65. Well, where was that with relation to the cars on the siding? A. That was the coupling was to be made on the siding at the five empty cars.

"Q66. Did you go to the extreme rear end of the five cars which stood on the easterly end of the siding? A. No, sir, not until after we coupled up.

"Q67. Well, where did you stop when you went back along the eastbound track? A. After we coupled up?

"Q68. No, before your train coupled up with the cars on the siding, and as you went back along the eastbound track, where did you stop? A. I stopped about a point between—well, I should judge about the second and third hind car of the five empties in the switch.

"Q69. Can you say where you stopped at that time with relation to the fence corner shown on the map? A. Yes, sir, I could point it out to you.

"Q70. Well, point it out if you will.

"Witness marks with E. P. just where he stood.

"MR. BAIN: I desire to have it appear upon the record that the point marked by the witness is almost directly opposite the yellow cross on the map.

"THE COURT: I understand you went back to a point opposite the easterly end of the five empty cars; is that right?

"THE WITNESS: Yes, sir.

"THE COURT: And you stopped there?

"THE WITNESS: Yes, sir.

"THE COURT: And that is the place where you now mark?

"THE WITNESS: When we coupled up, understand, I was at this point, well, you

may say just as I marked it there, about two car lengths between the five empty cars that stood there.

"Q71. That is, you were about in the center of the five empty cars at the extreme easterly end of the siding? A. Yes, sir" (p. 192, l. 23, to p. 195, l. 17).

As the witness ran back along the eastbound track he could see to the end of the siding. There was "not a soul" there (p. 196, l. 1). The first that he knew of the accident was when a huckster came across the track and the latter remarked "there's someone hurt." The huckster then walked through between the cars that stood at the rear of the siding and the two coal cars and picked the boy up (p. 197, ll. 1-10).

This witness gave the signal to the conductor to have the train back up; the latter was standing on top of the cars at about the middle of the train and facing west. Did not notice whether there was any blood on the ground but judging from where he saw the huckster stand after he had picked up the boy he was run over by the westerly truck of the two coal cars on the south side of the switch.

As train backed in on the siding witness was about a car length ahead of it at first, but he ran faster than the train; at first it moved about four miles an hour and as it got close to the cars on the siding it was moving about a mile and a half or two miles an hour (p. 199, ll. 20-30). The train coupled on to the five empties and the latter coupled on to the two coal cars, leaving a space between them and the cars at the extreme westerly end of the siding. It was through this space that the huckster came (p. 210, ll. 1-20).

The foregoing evidence of the crew was with-

out any substantial dispute. What more could they do than was in fact done? Every man was at his post—the engineer was operating his engine on the righthand side, the fireman was shoveling coal, the head brakeman was near the head of the train, the flagman was some distance to the rear of the train (where he had gone for the purpose of protecting it from other trains), the conductor was at the middle of the train and the rear brakeman had dropped off the train before it reached the siding and had set the switches, as was his duty. Before the signal was given for the train to back, the rear brakeman looked up and down the switch on both sides and then proceeded along the driveway (which was on the south side of the switch) and as the train backed in the brakeman ran ahead of it. The conductor was facing in the direction in which the train backed as it proceeded into the siding and he and the rear brakeman were watching to see if there was anybody at or near the place where the coupling was to be made and they both say that they saw no one. It may be suggested that if the brakeman had looked carefully he could have seen the boy as he was playing on the south side of the cars. Such an argument assumes that when this brakeman came through the opening between the cars that were standing on the siding and looked in each direction and on each side of the cars that the boy was at that moment in sight. But this assumption is not justified by the undisputed proof. While it is true the boy says he had been playing marbles for about an hour before the accident, it does *not* appear from his testimony that he was playing *at the same place during that hour.* On the contrary, the evidence of Kissler is clear

and positive that he Kissler, had seen the boy about five or ten minutes before the accident and that at that time the boy was playing at a point twenty-five or thirty feet east of the freight house and *between the freight house and the end of the switch* (p. 34, ll. 1-20). It may well be that the boy was in that place when the rear brakeman made his observations; and if the boy was at that point he might easily have been overlooked by the brakeman, as the two box cars at the rear of the siding would, of course, prevent the brakeman from seeing the boy if the latter were between the freight house and the switch, because he would then be behind those cars. If the boy then proceeded to the point of the accident while the brakeman was walking along the driveway in an easterly direction, surely the brakeman cannot be charged with carelessness in not seeing him, because the brakeman had already looked on both sides of the track. But even if the boy was near the scene of the accident for about an hour before the accident happened, still it does not follow that the brakeman was negligent in failing to see him. He might well have been hiding under the car—which he could easily do considering that he was only forty-four inches tall and the width of the rails was four feet eight and a half inches. When the train was backing into the siding it is obvious that at that time, at least, the boy must have been *under* the car and out of sight of the conductor. The latter says he could have seen anybody who was standing within two feet of the side of the car, but that he did not in fact see anybody. The boy himself says that he reached under the car with his foot to get a marble that had rolled to the further rail; and evidently in order to do this the boy would have to put his entire body beneath the car.

The fact that the boy was not in sight of the rear brakeman at the time the latter made his observation is further shown by the boy's evidence that he, the boy, did not see any railroad men at all before the accident (p. 102, l. 25). The boy's failure to see any employe of the defendant must have been due either to the fact that when the rear brakeman came across the rails of the sidetrack through the space between the cars the boy at that time either was near the freight house 150 feet or more distant, or was underneath the car.

Under these circumstances, we respectfully urge that there was no lack of reasonable care on the part of the defendant's agents. It surely cannot be said that the defendant was bound to have some members of the crew stationed at the cars on the siding for the purpose of driving people away as the train backed in. Every man of the crew was in his place and it was necessary for each to be in that place in order that the train might be properly operated. Before the cars on this siding were moved, reasonable observation was made to see if there was anybody in a place of danger, and it was not until after this observation had been made that the signal was given to back; as the train backed, this observation was continued, and no one was in sight.

There was no legal duty on the part of the defendant to ring the engine bell or blow the engine whistle as a warning that the train was about to back into the siding. The New Jersey statute with reference to the sounding of the bell or whistle is limited to a case when the train is approaching a grade crossing (N. J. Laws of 1903, p. 663; sec. 35; Vol. 3, Comp. Stats. of 1910, p. 4236). Moreover, the com-

plaint did not allege any negligence on the part of the defendant with respect to any alleged failure to give signals from the engine; there was no proof that such signals were not given (the record being barren of evidence either way on that subject); and the case was not submitted to the jury on any such theory. It was impracticable to construct a fence at and near the point where this accident happened, as it was necessary to provide a means of access to the cars that were placed on the siding from time to time, and a fence would cut off such access; indeed, the trial court charged expressly that it was not incumbent upon the defendant to have erected a fence or other barrier to keep children away from the siding and the cars (p. 226, ll. 20-25).

There was some evidence offered, against objection on the part of the defendant to the effect that, at some time prior to this accident, the defendant had had one or more watchmen on duty at and near the point of the accident. But the complaint did not allege any negligence by reason of any failure to have a watchman on duty at or near the scene of the accident, and the case was not submitted to the jury on any such theory. Even if there had been any such allegation on the complaint, we submit that reasonable care on the part of the defendant would not require it to keep a constant guard at this siding to drive trespassers off, neither would it require the defendant's employes to arrest children or to remove them by main strength or to chastise them if they refuse to leave. Not even the police force of the Borough of Garfield undertook to keep children away from the defendant's property.

In the Federal Courts a mere scintilla of evi-

dence is not sufficient to justify the trial court in submitting the question of negligence to the jury. The rule on this subject has been declared in *Patton v. Texas & Pacific R. Co.*, 179 U. S. 658, as follows:

> "That there are times when it is proper for a court to direct a verdict it is clear. It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it".

In *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, at p. 369, the court said:

> "As a preliminary to the consideration of the first question it may be well to repeat what this court often has said, that when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.
>
> *"Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478; *Delaware &c. Railroad Co. v. Converse*, 139 U. S. 469; *Southern Pacific Co. v. Pool*, 160 U. S. 438; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658."

The sole ground upon which the defendant's liability was submitted to the jury was whether there was negligence on the part of the brakeman or other members of the crew of the train in not exercising reasonable care to look out

for the plaintiff. The evidence on this point, above cited, shows, we submit, that the plaintiffs failed to discharge the burden resting upon them to prove that there was such negligence on the part of the defendant's servants.

The case of *Nappi v. Grand Trunk Ry.*, 99 Atl. 185 (N. H.), is a close precedent on the facts. We quote from the opinion as follows (italics ours):

> "The presence of the Nappi boy on the track before the accident was not known to any one, and therefore the defendants are not liable unless they were in fault for not discovering him. There was on the Longfield siding before the accident, eight freight cars in two groups, one group of six cars extended from near the easterly end of the siding to about opposite the Nappi house, then there was a space of two or three car lengths, after which was the other group of two cars. Just previous to the accident a train crew of four men took some of the freight cars that had come in from Island Pond, Vt., down the Flynn siding and switched them onto the Longfield siding, and in running the cars onto that siding the group of six cars on the siding was moved westerly and run over the Nappi boy, two cars and one truck frame passed over the body. The Flynn siding runs next to and by the side of the Longfield siding, and there is a level grade between them. When the train crew were taking the cars down the Flynn siding past the two groups of cars and the Nappi house, they did not see the Nappi child or any children on or about the Longfield siding or the cars thereon. A clerk to the supervisor of tracks was riding on top of one of the cars when they were passing down the Flynn siding, and continued riding there all the time the cars were being switched onto the Longfield siding, and he

did not see the Nappi child or any children on the track or about the two groups of cars.

"It was only a few minutes before the accident that the freight cars were passing down the Flynn siding by the two groups of cars and the Nappi house, when these men saw no children on or about the track near the Nappi house. As the cars moving down the Flynn siding reached the easterly end of the group of six cars on the Longfield siding a brakeman stopped to do the coupling, and remained there during the switching. When the cars reached the switch from the Flynn to the Longfield siding, another brakeman stopped, and remained during the switching.

"*In view of the circumstances it does not appear that the accident was caused by the negligence of the employees of the railroad.* The switching was apparently done in the ordinary way, a brakeman was stationed at the end of the cars to which the cars being switched were to be coupled, and another brakeman at the switch. It is true that children were on the tracks in that vicinity more or less, and, if the train crew had not just passed by these groups of cars, and not seen any children on or about the tracks, they should have gone alongside of the two groups of cars, and seen if any children were there.

"*The conduct of the train crew was reasonable, they had seen just before they switched the cars onto the Longfield siding that there were no children on or about that track, and there was no reason why they should anticipate any danger to the Nappi child or any one else.* The train crew not only did not see the Nappi child, but from the evidence as to his movements, it seems probable that he was not on or about the track as they passed by. When he went onto the track no one knows, but apparently during the few minutes from the time the train crew went by to the time when the cars were switched onto the Longfield siding.

"It could not be found that the failure of

> the train crew to discover the child was negligence, and there was no error in directing a verdict for the defendants."

In the foregoing discussion we have assumed that there was a duty on the part of the defendant to exercise reasonable care with respect to the plaintiff Hilt, Jr., and that the proof was insufficient to require the trial court to submit to the jury the question of whether there was any lack of such reasonable care. But we further contend that under the circumstances of this case the plaintiffs were not entitled to go to the jury *unless* there was some proof of wilful or wanton negligence on the part of the defendant or some of its agents, and that as the case is barren of any evidence on this subject, verdict should have been directed for the defendant accordingly.

Motion was made for direction of verdict on the ground, among others, the plaintiff, Halt, Jr., was a trespasser on the defendant's property, and that the defendant had not violated its legal duty to him as such trespasser (p. 217, l. 15, Assignments 3 and 6. The trial court charged the jury that the defendant owed to the boy the duty to exercise ordinary and reasonable care. Exception was duly taken (p. 236, ll. 20 to 30). See assignments 7 and 8, (pp. 249, 250).

There was no suggestion that any of the defendant's servants had any actual knowledge of the dangerous position in which this boy was when the cars were moved, or of the fact that he was on or near defendant's property. There is nothing whatever to suggest any wilful or wanton negligence. The question is whether under undisputed facts the defendant was bound to exercise reasonable care. The trial court held that the decisions in *Erie Railroad Company v. Swiderski,* 197 Fed. 521, and *Snare & Triest Co.*

v. Friedman, 169 Fed. 1, were controlling, but in both of these cases the accident happened *on a public street.* In the former case the plaintiff was playing around some freight cars which were standing on a siding located in a public street in Jersey City. In the latter case plaintiff was injured while playing on some heavy iron beams which had been negligently piled on the sidewalk in a public street. In the present case the accident happened on the private property of the defendant. Plaintiff had no right whatever to be there. We submit that the same rule should apply to a case of this kind, as in the case of *Schmidt v. Pennsylvania Railroad,* 181 Fed. 83. In that case the plaintiff was a boy eight and a half years old, and was crossing the railroad tracks between the cars of a parted freight train, on tracks that ran across the center of a city block or square. In that case, as in this, the open space on the side of the tracks was used by children as a playground; and workmen and others were accustomed to pass across the tracks to such an extent that two well defined paths had been worn connecting the corners of the square and converging about at the center. The train of freight cars had been cut in two about at the point where the path crossed the tracks. One of the plaintiff's youthful companions passed through the opening and the plaintiff, as he followed, caught his foot and fell, and at that moment the cars, without notice to the plaintiff were bumped together by an engine at the end of the train, and his leg was severed. The claim was that the men in charge of the train were bound to give warning before moving the cars. It was held that under the local law of New Jersey the company owed to persons using this crossing as licensees, only the duty of refraining from

wanton or wilful injury, citing the following New Jersey cases:

Vanderbeck v. Hendry, 34 N. J. L., 467;
Phillips v. Library Co., 55 N. J. L., 307;
Devoe v. N. Y. C. &c. R. R. Co., 63 N. J. J., 276;
Furey v. N. Y. C. &c. R. R. Co., 67 N. J. L., 270;
Sutton v. West Jersey &c., R. R., 73 Atl. 256; 78 N. J. L., 17.

In the Schmidt case the Court said:

"Assuming that there was a customary path leading up on either side to the railroad tracks where the accident occurred, by which the people of the neighborhood were wont to pass across these uninclosed lots, and that this had existed for such a length of time that the company was affected with notice and presumed to acquiesce in it, the use was merely a permissive one, which under the New Jersey law imposed no higher duty than not to do that which was recklessly or wilfully injurious. Nor was this duty modified by the fact that, on the occasion in question, the train which was occupying one of the tracks, and which was the cause of the accident, had been opened at the point where the paths converged, which fact cannot be wrested into an invitation or allurement to the plaintiff to go in between the cars in the course of crossing over, so as to require a warning from the trainmen in charge before closing the cars together. The use was still merely a permissive one. and the plaintiff stood in no higher relation to the company than that of a licensee, who took all the ordinary risks incident to the place and the business, among which was the moving or shifting of the cars occupying the track, back and forth upon it, according as it became necessary. The plaintiff therefore had no case, and a verdict for the de-

fendant was properly directed. Judgment affirmed."

If, as was held in the last cited case, the only duty on the part of the railroad was to refrain from wilful or wanton injury with respect to a child, who was crossing the tracks at a place customarily used for that purpose, how can any greater duty be required of the company when the accident occurs to a child who is admittedly a trespasser on the company's private property?

III.

There was error in the charge of the trial court.

Part of the charge to the jury was as follows:

> "The evidence of the boy, on the other hand, is that he and his little companion had been playing marbles in about the same spot for upwards of an hour before he was injured. Now, you would be justified, if you believed his testimony, in finding or inferring from it that either the brakeman did not look, as he testifies that he did, or that his looking was of such a cursory nature that he did not see these little boys, who, they say, were playing out in the driveway, but very close to one of the freight cars."

(P. 227, l. 28 to p. 228, l. 2; see Exception, p. 236, l. 30; Assignment of Error No. 9, p. 250, ll. 20-30.)

Later in the charge the trial court again called attention to this same point, saying:

> "Now, then, the significance of that is this: If the boy's story is correct, that he just put his foot under and moved the marble, and then the train hit him, it must have been a very short period of time after he put his foot under before the train started

> moving back; and, if his story is believed, all the time prior to that he must have been out in full view. Therefore he must have been out there, if you believe his story, at the time that the brakeman went through, unless it was he was actually hiding under the cars, or his story as to how long he was under there is not a true story. And, if you find that he was out there, you would be justified in finding that the brakeman did not look, or that his looking was not with the care that an ordinarily prudent person would have exercised under those circumstances, who was endeavoring to ascertain the presence of anyone there, so as to avoid injuring that person by the movement of the train."

(P. 229, l. 19 to p. 230, l. 1; see Exception, p. 237, l. 5; Assignment of Error No. 10, pp. 250-2.)

In giving this charge we think the trial court inadvertently assumed that there was evidence to show that the boy had been playing at or very near to the point where the accident happened for about an hour before the accident. The assumption must have been based upon the testimony of the boy wherein he said, during the course of his examination by the court:

> "Q. How long had you been playing marbles there before you were hurt? A. About an hour" (p. 103, l. 35).

The trial court in the charge took it for granted that this evidence showed that the boy and his companion had been playing marbles "in about the *same* spot" for an hour before the accident. It will be observed that the boy did not say that he was playing in the same spot, although it is possible that in the absence of other evidence such conjecture might be drawn from his testimony. But the evidence of the witness Kissler (called by the

plaintiff) is that he had seen the boy about five or ten minutes before the accident *and at that time he was playing between the freight house and the end of the switch* (p. 34, ll. 1-20). The distance from the easterly end of the freight house to the yellow cross marked on the map by this witness as indicating the point of the accident is about 180 feet (as shown by scaling the map Exhibit D. 1); and the distance from the westerly end of the siding to this same point is about 150 feet. Hence, according to the evidence of the only witness who testified on the subject as to where the boy was for a period of five or ten minutes before the accident, he was then at a point near the westerly end of the siding—the distance of which from the freight house would correspond to Kissler's statement that the boy was "about 25 or 30 feet" from the freight house—or, what is more probable, he was *between* the westerly end of the siding and the freight house. In the course of the trial this witness, Kissler, gave his testimony before the boy was called as a witness; and if the plaintiffs' counsel had any idea that Kissler was mistaken about it no doubt he would have directed the attention of the boy to this subject. It would take an active boy only a few seconds to walk or run from the point where Kissler said he was five or ten minutes before the accident to the point where the accident happened. While, of course, we do not criticize the right and, in a proper case, the duty of the trial court to comment on evidence in the course of the charge to the jury, we nevertheless submit that these parts of the charge were more than mere comments. They practically amounted to a statement to the jury that the boy and his companion had in fact been playing at about the same spot for an hour before the accident; and

from that assumed fact the jury were then told that they might be justified in finding that the brakeman either did not look at all or that his looking was so "cursory" that he did not see the boys. If the case was to be submitted to the jury at all with respect to the question of the defendant's negligence, it could be submitted only on the specific ground that such negligence was that of the brakeman or some other member of the crew in failing to see the boy near the cars before the signal was given to back. Hence, the charge of the trial court on this point was of vital importance and the misleading character thereof could not have failed to be prejudicial to the defendant.

These parts of the charge were prejudicial not only because they took away from the jury entirely all consideration of the testimony of Kissler, but also because they in effect directed the jury to assume not only that the boy was playing at the same spot where the accident happened for an hour prior thereto *but that he was in plain sight throughout that period of time,* and therefore if the brakeman did not see him and his companion the brakeman must have been careless in making his observation. But this overlooked the testimony of the boy himself that for a part of the time and shortly before the accident he was *under* the car. He said that his marble went under the car "away to the other wheel" (p. 107, l. 1); and that he reached in with his hand to get it, and in so doing he went "way over on the other side" (p. 107, l. 25). Then he tried to reach it with his foot and when he did that *he had to get all the way under the car* (p. 107, l. 35).

At the time of the accident the boy was 44 inches tall (p. 111, ll. 10-25). The width between

the railroad of the track is 56½ inches (p. 126, l. 35). The overhang of a freight car is from two to two and a half feet on each side of the rail (p. 127, ll. 1-10). It is therefore obvious that when the boy tried to reach the marble first with his hand and then with his foot he must have been out of sight underneath the car. There is no evidence as to where his playmate was at that time. He was not called as a witness, and Hilt, Jr., was not asked where he was. Very likely he was under the car also—at any rate there is no evidence whatever to show that he was in a position where he could have been seen by the brakeman, and the brakeman says positively that he saw no one. Hence, under this evidence the jury would have been justified in inferring either that the boy was under the car or in some other place where he could not be seen by reasonable observation at the time that the rear brakeman, Pruner, looked to see if there was anyone near the cars. Even if the jury entirely disregarded the testimony of Kissler, they still would not be justified in infering *only* that the boy was in a position where he could be seen by reasonable observation at the time that Pruner looked; it was therefore erroneous to charge the jury that they would be justified, if they believed the boy's testimony, in inferring therefrom that either the brakeman did not look or that his looking was so cursory that he did not see the boy.

That part of the charge secondly above quoted reiterated and emphasized this error in that the jury were told that if the boy's story was believed he must have been "out in full view" all the time prior to the accident, and therefore he must have been there when the brakeman made his observation, unless he was actually hiding or unless his story as to how long he was under the car

was not true. This overlooks the fact to which we have called attention that there was evidence to show that five or ten minutes before the accident the boy was not at this car at all but 150 feet or more distant therefrom. It also overlooks what is at least a fair inference from the boy's own story that he may have been under the car at the time the rear brakeman made his observations. There certainly was no duty on the part of the brakeman to look *under* the cars—and the trial court expressly so charged (p. 228, ll. 15-23).

We submit that these parts of the charge were misleading to the jury on the very point upon which the question of liability turned—if there was any liability at all—and that therefore there should be a reversal.

If the charge is calculated to mislead the jury on a material point, there should be a reversal.

> *Talmage v. Davenport,* 31 N. J. Law, 561.

It should be clear that the misdirection has done no harm to the party complaining thereof, and if there is reasonable doubt on that point, he is entitled to the benefit of the doubt.

> *Buckman v. Bergholz,* 37 N. J. Law, 348.

An expression which might have misled the jury, to the prejudice of the defendant, requires reversal, even though the general statement of the law is correct.

> *Lindley v. O'Reilly,* 46 N. J. L. 352.

An erroneous instruction on an essential point is not cured by a general instruction elsewhere in the charge.

> *State v. Topack,* 78 N. J. Law, 208; 72 Atl. 962.

In the last cited case the court said:

> "The rule is well settled that an erroneous instruction followed or accompanied by a correct one is not cured by the latter unless it is also expressly withdrawn, as the jury is left at liberty to adopt either".

To the same effect see *Collins v. Central R. R. Co.*, 101 Atl. 287.

Illustrative cases in the Federal Courts are the following:

In *St. Louis etc. Ry. Co. v. Needham*, 52 Fed. 371, held that, where the court erroneously charged the jury as to the method of ascertaining the damages, the error was not cured by the subsequent statement in the charge that the whole matter of damages was left to the judgement of the jury.

The same case is again reported after a second trial in 63 Fed. 107, and a judgment for the plaintiff was again reversed—this time for error in refusal to charge as requested by the defendant, the Court of Appeals saying:

> "A general verdict cannot be upheld where there are several issues tried, and upon any one of them error is committed, in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling." Citing *Coal Co. v. Johnson*, 56 Fed. 810; *Maryland v. Baldwin* 112 U. S. 490.

In *Pittsburgh &c. Ry. Co. v. Russ*, 57 Fed., 822, held that the error in instructing the jury that the defendant was not liable for exemplary damages under the facts proven, was not cured by the further statement in the charge that in the

opinion of the judge the defendant's employe was not malicious, wanton or oppressive in his conduct.

In *Durant Mining Co. v. Percy*, 93 Fed., 166, held that an erroneous instruction is presumed to be prejudicial, and is not cured by a correct direction upon the same subject in another part of the charge.

In *Standard Insurance Co. v. Sale*, 121 Fed., 664, held that an erroneous instruction on a material point was not corrected by a subsequent proper instruction, when the first instruction was not recalled or explained. The Court said:

> "The difficulty created by inconsistent or contradictory instructions of a material point is, first, that it is impossible for the jury to know what is to be their guide; and secondly, it is impossible after verdict to ascertain which instruction the jury followed." (P. 669.)

In *Armour & Co. v. Russell*, 144 Fed., 614, the Court in its charge stated the true rule as to the degree of care on one portion and stated an erroneous rule on the same subject in another portion of the charge. The judgment was reversed, the Court saying:

> "It is true that in some parts of the charge the court stated the true rule upon this subject to the jury. The presumption however is that error produces prejudice.
>
> "It is only when the fact so clearly appears to be beyond doubt that an error challenged did not prejudice, and could not have prejudiced the complaining party, that the rule that error without prejudice is no ground for reversal is applicable."

In *New York Transportation Co. v. O'Donnell*, 159 Fed. 659, held that in an action for the death of a pedestrian struck by an automobile, an in-

struction that if, when he first saw the automobile, he was in a position of imminent danger from it, the doctrine of contributory negligence did not apply being erroneous as withdrawing from the jury the question whether the pedestrian was negligent in getting into the place of danger, the error was not cured by instructions in other parts of the charge dealing at length with the question of contributory negligence.

IV.

Verdict should have been directed in favor of the defendant on the ground that the evidence showed without dispute that the plaintiff Hilt, Junior, was guilty of contributory negligence as a matter of law.

The evidence of the boy as to the circumstances of the accident has been quoted at length under Point II and need not be again repeated. It is sufficient to say that his own evidence shows clearly that he knew it was dangerous for him to place any part of his body under the car and that he would be injured if the car moved while he was so doing—indeed, he says that he thought the car was going to be moved and, to avoid the possibility of, as he put it, being "smashed to pieces" by crawling under the car, or of losing his hand by reaching under the car with his hand, he placed his foot under the wheel. He knew that his foot would be crushed if the car was moved while his foot was under it, but he thought that if the car did move he could withdraw his foot quickly enough to prevent injury. We submit that in view of this evidence he is not entitled to recover, as he deliberately

took the risk of possible injury by the movement of the car. His testimony showed that he was much more mature than the average boy of his age. He fully realized and understood what he was doing and the danger that might arise therefrom.

It was said in the case of *David v. W. J. & S. R. R. Co.*, 84 N. J. L. 684, that:

> "There has been a time in the life of every person of mature judgment, as all agree, when he was incapable of exercising the care and judgment necessary to avoid and avert danger and was *non sui juris*. There is a time, also, when he is in law an adult and responsible as such. Between these two periods is a transition stage, during which his responsibility depends upon matters of fact. *McDonald v. O'Reilly*, 45 Oreg. 589. In this transition period he may or may not be guilty of contributory negligence. *Traction Company v. Scott*, 29 Vroom 682. *Fitzhenry v. Consolidated Traction Co.*, 45 Id., 674. * * *
>
> "The degree of care required of such a child is such as is usually exercised by persons of similar age, judgment and experience. * * *
>
> "And so in order to determine whether a child in such transition period has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience and capacity to understand and avoid the danger to which it is exposed in the actual circumstances and situation under investigation; and it is usually a question for the jury to determine whether the child has been guilty of contributory negligence. *Traction Co. v. Scott, supra.*"

In *Hayes v. Norcross*, 162 Mass. 546, plaintiff, a boy of five years six months old, was run

over by the defendant's team. The Supreme Court of Massachusetts held that the plaintiff was chargeable with negligence as a matter of law, it appearing that he started to cross the street directly in front of the defendant's horse, at a time when the hosre was very near to the plaintiff as he left the sidewalk. The Court said:

> "The conduct of the plaintiff in this case was such as the judgment of common men would universally condemn as careless in any child of sufficient age and intelligence to be permitted to go along and across a street on which teams are frequently passing."

Referring to the earlier case of *Collins vs. South Boston R. R.*, 142 Mass., 301, the Court quoted therefrom as follows:

> "It would seem that, if children unreasonably, intelligently and intentionally run into danger they should take the risks, and that children as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and that they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless, because children are often reckless and mischievous."

In *Brady v. Consolidated Traction Co.*, 63 N. J. L. 25, the plaintiff was a boy of nine and a half years of age, and was injured while playing in the street. He ran in front of a trolley car which he saw approaching and was struck. Held that there was no element of danger which he did not perceive, or which a boy of his years was not capable of fully appreciating. Verdict for plaintiff was set aside.

In *Anderson v. Central R. R.*, 68 N. J. L. 269,

plaintiff's intestate was a boy not quite nine years of age, and was struck and killed at a highway. A direction of verdict for the company was sustained on the ground that "the peril must have been appreciated by the boy, and that when he exposes himself to such peril without any precaution, there is no question for the jury."

In *Fitzhenry v. Consolidated Traction Company*, 64 N. J. L. 674, the plaintiff was a girl nine years of age, and was struck by a trolley while crossing the street. Non-suit was sustained on the ground of contributory negligence when it appeared that in her attempt to cross, the plaintiff acted in entire disregard of the degree of prudence which might be reasonably expected from one of her years.

In *Dull v. Cleveland &c. R. Co.*, 52 N. E. 1013, 21 Ind. App. 571, a child seven years of age and of sufficient intelligence to know the difference between danger and safety held to be *sui juris*, so as to be chargeable with contributory negligence as a matter of law.

In *Fezler v. Willmer &c. Ry. Co.*, 88 N. W. 746, 85 Minn., 252, a boy about ten years old who entered on an unfenced right of way, and was injured while running beside a train to keep up with it, held chargeable with contributory negligence as a matter of law.

In *McDermott v. Kentucky Ry. Co.*, 93 Ky. 408, 20 S. W. 380, plaintiff was a boy, eight years old. He was hurt while trespassing on the tracks in a switch yard. He was familiar with the movements of the train and of the engine that hit him. Held he could not recover as he was chargeable with contributory negligence.

V.

For these reasons the judgments of the United States Circuit Court of Appeals for the Third Circuit and of the United States District Court for the District of New Jersey should be reversed and a new trial ordered.

GILBERT COLLINS,
GEO. S. HOBART,
Counsel for Petitioner.

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No. 846

FILED
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Supreme Court of the United States

October Term, 1917

ERIE RAILROAD COMPANY

Petitioner

vs.

EDWIN J. HILT, Jr., an infant, by Next Friend, and EDWIN J. HILT, SR.

Respondents

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF IN BEHALF OF EDWIN J. HILT, Jr., and EDWIN J. HILT, Sr., RESPONDENTS

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—1918—

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Supreme Court of the United States

OCTOBER TERM, 1917,

No. 846.

ERIE RAILROAD COMPANY, *Petitioner,* *vs.* EDWIN J. HILT, JR., an infant, by next friend, and EDWIN J. HILT, SR., *Respondents.*	On certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF IN BEHALF OF EDWIN J. HILT, Jr., AND EDWIN J. HILT, Sr., RESPONDENTS.

Statement of the Case.

(a) Manner in Which Question is Raised.

This proceeding comes before the Court on a writ of certiorari allowed on March 11th, 1918, to review a judgment of the United States Circuit Court of Appeals for the Third Circuit, affirming a judgment entered in the United States District Court for the District of New Jersey in favor of the respondents (hereinafter called plaintiffs) and against the petitioner (hereinafter called defendant). The two plaintiffs were joined in the action by virtue of the provisions of "The Practice Act" of 1912 of the State of New Jersey

(see Chapter 231 of Pamphlet Laws of 1912, p. 377, Section 4). The action was brought by Hilt, Jr., to recover damages for personal injuries sustained by him on account of being run over by a freight car operated by the defendant at Garfield, in the State of New Jersey, on April 6, 1916, and by Hilt, Sr. (father of Hilt, Jr.), to recover damages for the medical expenses and the loss of services of his son during the latter's minority. The questions involved in the case were submitted to the jury for determination and a verdict was rendered for the sum of $25,000 in favor of Hilt, Jr., and for the sum of $1500 in favor of Hilt, Sr. The verdict of Hilt, Jr., was thereafter, on rule to show cause, reduced to $10,000 by the Trial Court and judgment was entered accordingly in his favor for that sum. The verdict of Hilt, Sr., was not disturbed on the rule and judgment was accordingly entered in his favor for $1500. After the affirmance of this judgment by the United States Circuit Court of Appeals for the Third Circuit the application of the defendant to this court for review by certiorari was duly granted.

The decision of the Circuit Court of Appeals is reported in 246 Fed. 800.

(b) Facts.

Defendant operated a railroad known as the "Bergen County Railroad," the tracks of which extended in and through the Borough of Garfield, in the State of New Jersey. At and near the point where the plaintiff was injured, there were two main line tracks: one known as the west bound track on which were operated trains *from* Jersey City; the other as the east bound track on which were operated trains *to* Jersey City. On the southerly side of the east bound track was a

switch known as the "local siding," which was used for the receipt and delivery of freight to and from cars that might be standing thereon. This siding extended from a point some distance to the east of a street known as Hobart Place in a westerly direction, adjacent to and parallel with the east bound track; the freight house was located about thirty feet west of the westerly end of the siding. To the south and adjacent to the siding there was a driveway about twelve feet wide, which extended from Hobart Place in a westerly direction for a distance of about three hundred fifty feet. This was used as an approach to the freight house and to any cars that might be on the siding. A street known as Bogart Avenue intersected Hobart Place some distance to the south of the railroad tracks, and ran thence in a northwesterly direction almost parallel to the siding and at a distance varying from about one hundred sixty feet to about fifty feet southerly therefrom, to a street known as Passaic Street, which crossed the tracks at a distance of about seven hundred feet westerly from Hobart Place. From the northerly boundary line of Bogart Avenue there was an open space or driveway which was also used as an approach to the siding and freight house. On the southerly side of the first named driveway there was a fence which began at the westerly line of Hobart Place extending in a westerly direction for about three hundred fifty feet, where it turned at right angles in a southerly direction for a distance of about seventy feet to the northerly line of Bogart Avenue.

For years prior and up to the happening of the accident forming the basis of this suit, children, from three to fifteen years of age, congregated and played about the driveway near the

siding, on the sid ng and the tracks, and on and about cars which were left on the siding both loaded and unloaded. Such was a daily occurrence and was known to all of the employees of the defendant company working at or near the scene of the accident. Once in a while employees of the defendant company would chase the children away from the cars. But it was a common occurrence for such children to be playing on the siding and on and about the cars thereon even while switching was going on on said siding without such children being chased away by employees of the road or warned by them.

On the day of the accident and immediately prior thereto, and at the time thereof, there were on said siding cars as follows:

(1) Two loaded box cars about thirty feet east of the westerly end of the siding;

(2) Two loaded coal cars, the westerly end of which was about fifteen feet east of the easterly end of the loaded box cars;

(3) Five empty box cars, the westerly end of which was about fifteen feet east of the easterly end of the coal cars.

Infant plaintiff, a box about six or six and a half years of age, together with another boy a little younger, were playing in the driveway on the southerly side of the siding, and about a foot or so from the two loaded box cars thereon. They had been playing at or near such place for about an hour prior to the accident. They were playing marbles. One of the marbles of the plaintiff (infant) rolled under the car. He reached under the car with his leg and pulled the marble toward him. It did not come far enough for him to get it and he reached again to pull it toward him when the defendant, through its servants, backed in a train of twenty cars upon said siding, strik-

ing the five empty box cars with such force as to drive them back upon the two loaded coal cars (a distance of fifteen feet), and the loaded coal cars backed against the two empty box cars (a distance of fifteen feet), causing the wheels of one of the box cars to run over the leg of plaintiff (infant) as he was in the position above mentioned, cutting the leg off. No warning was given to infant plaintiff of the approach of the cars, nor did he know that they were in the vicinity.

The conductor in charge of the freight train had worked around the vicinity of the accident and so had the crew in charge of the train. He knew that children were accustomed to play about the switch and siding, and so did the brakeman in charge of the rear end of the freight train.

Statement of Questions Involved.

1. Defendant for many years, prior and up to the time of the happening of the accident forming the basis of this suit, maintained lands, railroad tracks, sidings or switches within sixty feet of a public street (said land being unfenced and open) and in the immediate vicinity of dwelling houses; upon which tracks and switches it stored cars, loaded and unloaded. During such period, it permitted children of very tender years—from 3 to 15 years of age—to congregate and play upon such lands, tracks and switches, and in and about the cars thereon. The testimony showed that the boys played in between the cars, on the cars, and all around them, even while switching was going on on the siding.

On April 5, 1916, plaintiff (infant), a boy aged 6½ years, together with another boy a little older, was playing about the switch or siding, and about

a foot or so away from some freight cars standing thereon and on the south side thereof. They were playing marbles. One of the plaintiff's (infant's) marbles rolled under one of the standing freight cars, and plaintiff put his leg under the car to pull the marble out, and while he was in this position, defendant, without warning plaintiff of its intention so to do, backed the train upon the switch or siding, throwing it upon some coal cars, which, in turn, were thrown against the standing freight cars with great force, driving them back and causing one of them to run over the leg of plaintiff (boy), cutting it off. It appeared from the evidence that the boy had, with another boy, been playing marbles at or near the point of the accident for about an hour prior to his injury. He neither saw, heard or knew of a train being in the vicinity. No warning by whistle, bell or otherwise was given him of the approach of the train. Three witnesses testified that immediately after the injury and while the boy lay on the ground near the track, the other little chap who had been playing with him was standing by him. One witness testified that he had seen the two boys playing near the tracks a short distance away about five minutes before the accident. It further appeared that one witness for defendant stated that while the train had been moving on the main line track, he had jumped off on the north side of the siding through an opening between the cars to the south side, glanced both ways, but not tarrying a minute, and ran up to the switch (420 feet away) to turn it, to permit the train to back up, turned it and ran back on the north side of the siding. That he saw no children on the south side of the switch. The conductor was upon the top of the car at about the middle of the train as the train proceeded easterly on the main track, past the

siding. The train consisted of 20 box cars, each about 35 to 37 feet long. He claimed to have looked along the sides of the cars and to have seen no children. After he passed the siding and was backing into it, he could not see along the sides because of the empty cars.

Under the circumstances, was there sufficient evidence of negligence on the part of defendant's employes to require the trial Court to submit to the jury the question of whether or not the employes of defendant exercised reasonable care in warning or looking for children playing on the switch and on or near the cars before the train was backed into the siding?

2. The brakeman having testified that he jumped off the train when it proceeded on the main track, ran through the opening between the cars, glanced both ways, but not tarrying a minute, seeing no one, and running immediately up toward the point of the switch, a distance of about 420 feet, turning the switch and immediately crossing the siding, running and returning on the north side thereof, and the boy testifying that he had been playing with another boy by the cars for upwards of an hour prior to the accident, and it appearing from the testimony of three witnesses that immediately after the cars had come together, both boys were on the south side of the switch near the tracks (the injured boy laying on the ground and the other boy standing by him), although a witness testified that about five minutes before the accident he had seen the boys a short distance away, did the Court commit legal error in charging the jury that if they believed the boy's testimony they would be justified in inferring that either the brakeman did not look, or that his looking was of such a cursory nature that

he did not see the little boys, and that it was for them to say whether, under the circumstances, the brakeman exercised the care of an ordinarily prudent person?

3. Under the circumstances above set forth, should the Court have directed a verdict for defendant?

4. Under the circumstances above set forth, it appearing that the boy had not seen nor heard the train, nor knew of its presence, and that no warning had been given him, and further testifying that he put his foot, instead of his hand under the car to get the marble because he was afraid if he crawled under or reached under it with his hand "he would get all smashed to pieces" if the car moved, and it further appearing that he was an infant aged 6½ years, did the Court commit legal error in refusing to direct a verdict for defendant on the ground that the boy was guilty of contributory negligence as a matter of law?

5. Was the father of the boy to warn the infant of the danger of playing around railroad tracks and cars—although he had warned him to look out for trolley cars, horses and wagons, automobiles, motor cycles and bicycles—contributory negligence as a matter of law?

6. Did the Court commit legal error in refusing to strike out the admission of certain evidence:

(a) As to how a certain witness had seen switching done at the point in question?

(b) That children were accustomed to play on or near the siding?

(c) That on occasions prior to the accident defendant had employed a watchman at or near the siding, in addition to the station employes and members of drilling crews?

7. There existed at the time of the accident a statute in New Jersey, providing that if any PERSON shall be injured by an engine or car "while walking, standing or playing on any railroad" such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad—provided, this section shall not apply to the crossing of a railroad by any person at any lawful, public or private crossing (Pamphlet Laws 1903, page 673, Section 55). Should the Court under the circumstances of this case have directed a verdict for defendant on the ground that the accident was due to a violation of said statute?

8. Expressing the matter differently—Should the United States Supreme Court follow the construction placed upon the said statute by the New Jersey Supreme Court (not the highest Court in that State), or should it follow the construction placed thereon by the United States Circuit Court of Appeals for the Third Circuit?

I.

The Court did not err in refusing to direct a verdict for defendant upon the ground that the evidence showed that Hilt, Jr., was injured by a car while standing or playing on a railroad, in violation of Section 55 of the Statute of the State of New Jersey, entitled "An Act Concerning Railroads (Revision of 1903)."

Section 55 of the "Act Concerning Railroads" above mentioned, provides:

> "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk upon the tracks of any railroad, except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the railroad company, owning or operating said railroad; provided that this section shall not apply to the crossing of a railroad by any person at any lawful, public or private crossing." Pamphlet Laws of New Jersey, 1903, p. 673 (3 Comp. Stat. 1910, p. 4245, Sec. 55).

The history of the statute is correctly set out in defendant's brief.

(a) The statute does not apply to infants of tender years.

The statute was considered in the following cases:

Diebold v. P. R. R. Co., 50 N. J. L. 478.

"In this case an *adult* had departed from the portion of the premises upon which he had been invited, and while standing on or near the tracks in the drilling yard of the defendant, was struck by a car."

Powell v. Erie Railroad Co., 70 N. J. L. 290.

"In this case an *adult* had *jumped* upon a moving coal train: a brakeman threw some pieces of coal at him and he *jumped off*."

Furey v. New York Central Railroad Co., 67 N. J. L. 270.

"In this case an *adult* painter walked between two standing cars and was injured by reason of them coming together as a result of an engine backing one of them up. The Court refused to apply the provisions of the statute holding that the same did not apply to one *crossing* the railroad tracks."

In *Barcolini v. West Jersey &c. Railroad Co.*, 82 N. J. L., 107, the New Jersey Supreme Court held that the statute applied to an infant of the age of 21 months.

The Court of Errors and Appeals of the State of New Jersey (the highest Court of that State) has never passed upon the question, and the decision of the Supreme Court is not binding upon the Federal Courts. The application of the statute, therefore, to cases wherein children of tender years have been injured while upon the tracks of a railroad, is to be determined by the Federal Courts without regard to the decision of the Supreme Court as a determining factor.

The statute undoubtedly applies to adults, and, in all probability, to infants of such age and capacity as to be held as matter of law, to have arrived at the age of discretion and understand-

ing, but we submit that the statute is not applicable to the case at bar.

While it may be true that the statute was passed to prevent accidents on railroads, and to discourage the walking, standing or playing on railroad tracks of persons who have arrived at such an age as to fully appreciate the dangers of so doing, yet to apply the terms thereof to infants of such tender years as to be incapable of caring for their own safety, seems harsh and inhumane, and not in accordance with the true intent of the legislature. It has always been the policy of the state to safeguard the life and limb of its citizens, and particularly those of infants of tender years, and to surround them with protection against those things which, because of their immature years and lack of understanding, might injure them. The Courts have consistently followed those principles.

So a great many distinguished Courts have held that an infant of tender years cannot be guilty of contributory negligence, nor can he be a trespasser, nor is he to be judged by the same standards as a person of mature years, nor is he bound by his contracts made during infancy and disavowed upon his arriving at maturity.

While it is true that there are decisions by the Courts of the State of New Jersey holding that one going upon the lands of another as a trespasser or mere licensee, can recover from the owner only in case of injury wilfully or wantonly inflicted, there is no such settled rule of law established by the decisions of the New Jersey tribunal of last resort, as would be binding upon the Federal Courts under the circumstances of this case.

Snare & Triest Co. v. Friedman, 169 Fed. p. 1 at p. 15.

The Federal Courts, realizing the inability of children of tender years to care for themselves, and the dangers which their impulsiveness and thoughtlessness leads them into, have refused to hold that infants of tender years, who have been attracted and enticed into a place of danger for the purpose of play, cannot recover for injuries received due to the owner's negligence, where the owner knew, or had reason to know, of the custom of such children to be at such place, but, on the contrary, have consistently permitted such a recovery.

> *Railroad Co. v. Stout,* 17 Wall. 657; 21 L. Ed. 745 and cases cited under Point II following.

Bearing in mind the rule of law as laid down in the Federal Courts (*Railroad Co. v. Stout,* supra and cases following the same) we submit that the statute is not aplicable to the case at bar.

The very wording of the statute plainly indicates that there must be a voluntary action upon the part of the person injured accompanied by an understanding of the action taken. The person injured "shall be deemed to have contributed to the injury sustained". Surely to contribute to the injury, the action of the person injured must have been a voluntary action understandingly taken.

Surely an *idiot* or insane person straying on to a railroad track and injured by a train, could not be "deemed to have contributed to the injury sustained by him".

In *State vs. Brown,* 38 Kan. 390; 16 Pac. Rep. 259, in construing a statute providing that if any person shall be drunk in any highway, street or other public place, etc., he shall be punished, etc., held that the words "any person" should be construed to mean only such persons as act vol-

untarily in performance of the interdicted act and hence does not include idiots, insane persons, *children under seven years of age, etc.*, stating

> "Human actions can hardly be construed as culpable either in law or morals unless intelligent consent of the mind goes with the action, and to punish where there is no culpability would be the most reprehensible tyranny."

This court has held that an infant of tender years cannot be guilty of contributory negligence. How, then, could such a one, injured while on a railroad track, be "deemed to have contributed to the injury sustained"? Logically he could not.

While it may be that the legislature has power to enact laws applicable to infants of tender years in cases like the case at bar, it would seem, however, that had the legislature intendede the statute to be applicable to infants of such tender years as to be incapable of caring for their own safety, it would, by clear and unmistakable language, have done so. This, we submit, it has not done.

The United States Circuit Court of Appeals, for the Third Circuit, in the case of *Swiderski v. Erie R. R. Co.*, 197 Fed. 521, directly involving the application of this statute, said:

> "It is now, as it was upon the trial, contended by defendant that peremptory instructions in its favor should have been given on two grounds: First, that plaintiff's recovery was barred by section 55 of the General Railroad Law of New Jersey (3 Comp. St. p. 4245; see foot note); and, second, that even if not barred thereby plaintiff was a licensee for whose injury through defendant's negligence the latter was only answerable if such negligence was wanton and wilful.
>
> (1) The answer to the first question de-

pends on whether a child playing at the locus in quo, with the implied consent of the defendant, and whose infancy is such that it cannot be charged with contributory negligence, falls within the provisions of such statute. Prior to the passage of this statute, the law was settled that a child of such tender years as to be incapable of discerning danger or of exercising sufficient care for its own safety could not be held guilty of contributory negligence. 1 Thompson's Commentaries on the Law of negligence, §303. It follows, therefore, that if this statute is held to be simply declaratory of the pre-existing law the word 'person' must be held to include such infants only as in law may be guilty of contributory negligence. On the other hand, if the statute is held to impose on such immature infants the burden of con-tributory negligence, it is a non-remedial, and in its effect well nigh a penal, statute. It, then, two constructions of this statute are possible, one that the statute was simply declaratory of the humane principles of the common law, the other depriving children of these common-law rights, it would seem clear that, unless constrained by express and unquestionable language, the former construction should prevail, for:

"Where a statute is equally susceptible of two constructions, one of which is harmony with a settled principle of the common-law and the other in derogation of it, the courts will adopt the former." *Ryan v. Couch,* 66 Ala. 244.

"And as was further said in Maxwell's Interpretations of Statutes, 96:

"It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because, in their widest and perhaps natural sense, they have that meaning, would

be to give them a meaning in which they are not generally used."

"The rule on this subject is well stated thus by Black on Interpretation of the Law, §313:

"Statutes in modification or derogation of the common law will not be presumed to alter it further than is expressly declared or further than may be fairly and reasonably inferred from the purpose and nature of the statute or from the language employed in it. Such acts will be liberally construed, if their nature is remedial, but their operation will not be extended for a forced construction. The presumption is that the terms of the statute disclose the extent of the alteration or change it was desired to effect."

"Tested by these standards, it seems to us that a clear purpose, expressed in indisputable terms, to change the existing law in reference to immature children, is not found in this statute. If such an intent exists, it exists alone in the use of the comprehensive word 'person'. But the contention that such meaning should be given that word is met by the fact that, in view of the nonremedial and restrictive effect of this law on prior beneficient rights, no such broad use of the word 'person' should be given it in the abesence of any expressed purpose that such was the intent of the Legislature. Indeed, this principle of interpretation had been emphasized in New Jersey prior to the passage of this act, where, in *State v. Norton*, 23 N. J. L. 40, it was said:

"It is a rule of exposition that statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the Legislature, intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced, for if Parliament had had that design, it is naturally said they

would have expressed it. *Dwarris on Statutes,* 695."

"In the same case, referring for support to 1 Blackstone, Commentaries, 89, it was said:

"When the common law and a statute differ, the common law gives place to the statute, only when the latter is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative."

"The foregoing decision gives the true interpretation of the statute."

(b) The statute does not apply to infants INVITED upon such premises.

In the case at bar the defendant impliedly *invited* the infant plaintiff to go upon the premises whert he was injured. For years prior to the accident infants of very tender years had been accustomed to play in and upon the tracks at this point, and in, upon and between railroad cars standing thereon. Of these facts the defendant had actual knowledge; all of its servants working nearby knew of it, and the crew of the train which backed into the cars where infant plaintiff was, knew of it. By permitting children of tender years to so play upon said railroad tracks, and in, about and between said cars, as aforesaid, the defendant impliedly invited them so to do.

In the case of *Kaffe v. Milwaukee & St. P. R. R. Co.* 21 Minn. 207, 211, cited with approval by the United States Supreme Court in *Union Pacific R. Co. v. McDonald,* 152 U. S., 262; 38 L. Ed. 434, the Court said

"Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. * * * * * The defendant, therefore, knew that by leaving this turntable unfastened and unguarded, it was not merely inviting young

children to come upon the turntable, but was holding out an allurement, by which, acting upon the natural instincts by which such are controlled, drew them by those instincts into hidden danger."

The Kaffe case is referred to by Judge Colley in his Treatise on Torts. Alluding to the doctrine of implied invitation to visit the premises of another, he says:

> "In the case of young children, and other persons not fully sui juris, an implied license might sometimes arise when it would not on behalf of others. Thus leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it; and, perhaps, if one were to throw away upon his premises, near the common way, things tempting to children, the same implication should arise." Chapter 10, p. 303.

The defendant could not *invite* the plaintiff upon its premises and then interpose the statute as a defense to an action to recover damages for injuries inflicted upon him by reason of its negligence.

II.

The Trial Court did not err in refusing to direct a verdict for defendant on the ground that there was no evidence of negligence on the part of the defendant or any of its servants or agents.

That defendant maintained upon its premises near by the public highway, railroad tracks and cars upon, around and between which small children had been accustomed to gather and play, is proven not only by the evidence of the witnesses for the plaintiff but by the testimony of the servants and agents of the defendant. (See Record, Plaintiff; Hilt, Sr., p. 13, ll. 7, 8, 9; p. 14. Maitland, pp. 37, 40, 43; Simoldini, pp. 45, 47; Vitali, pp. 57, 58, 59; Farrell, pp. 73, 83, 87, 94; Brown, p. 112. Defendant: Madigan conductor, p. 149; Dougherty, passenger and freight agent, pp. 178, 181, 184; Wiser, p. 185; Holmes, section foreman, p. 187).

The playing of children at such points had been going on for a number of years to the knowledge of the servants and agents of the defendant railroad company (see Record, Madigan, p. 149; Dougherty, pp. 178, 181, 184; Wiser, p. 185; Holmes, p. 187), and see testimony of witnesses of plaintiff hereinabove mentioned.

Under such circumstances, it is submitted that it became the duty of the defendant, having such knowledge to use due care and diligence in the movement of its trains at such point to avoid injury to children thus playing.

Railroad Co. vs. Stout, 17 Wall., 657; 21 L. Ed., 745.

Union Pac. R. Co. vs. McDonald, 152 U. S., 262; 38 L. Ed. 434.

Peirce vs. Lyden 157 Fed. 552;
Snare & Triest Co. vs. Friedman, 169 Fed. 1;
Swiderski vs. Erie R. R. Co., 197 Fed., 521;
Shesko et al. vs. Delaware & Hudson Co., 218 Fed., 804.

Defendant does not contest this rule of law.

This brings us to the inquiry as to whether or not such care and diligence *was* exercised by the servants of the defendant in the case at hand as was required under the circumstances existing at the time. It appeared from the testimony of the plaintiff (infant) that he had been playing miggles near the switch, another boy playing with him (p. 102), and had been so playing for about an hour (p. 103); that he had never played there before, nor had he played on the cars before, nor had he been chased away therefrom (p. 104); that while so playing near the tracks, one of his marbles (or miggles, as he called them), rolled under a freight car and he put his leg in, got the miggle up near the track and was pulling it out further when the car came back and cut his leg off (pp. 101, 107); that he neither saw nor heard an engine or train, nor any whistle or warning of any kind, nor did any one shout to him, nor did he see any railroad man or employee there (pp. 102, 104). Three disinterested and unimpeached witnesses testified that immediately after the clash of the cars coming together, they saw injured lying beside the track, and the other little chap standing beside him (Isabel Farrell, p. 92; Esther Farrell, p. 94; Kisler, p. 33).

Kisler states that he saw the boys about five minutes or so before the accident, playing near the tracks of the switch, a short distance away from where plaintiff (infant) was injured (p. 33).

If this were all the testimony on this point, it is evident that the Court would have been justified in directing a verdict for plaintiff. Up to this point it appeared that no warning of any kind was given to plaintiff (infant) of the oncoming train, nor was any attempt to warn him or ascertain his presence at a point where defendant knew children, for many years, were accustomed to gather and play.

Defendant seeks to offset this testimony by introducing the evidence of two witnesses on this point. The conductor stated that he was on the top of a car in the middle of the train of twenty box cars, each about 35 to 37 feet long; that as his train proceeded eastwardly he faced in that direction and he could see the box cars on the siding and saw no children there (p. 149). He admits, however, that unless they were at least two feet away from the side of the car he could not see them (p. 154). That after he had passed the box cars on his way east, he could not see the southerly side of the switch at any time (p. 158). The statement in defendant's brief (p. 30) that witness, Madigan (the conductor), stated that as the train *backed* in, he could see children if they were a couple of feet away from the car, is misleading. Witness was speaking of the time the train was proceeding east on the main line track (p. 154, lines 14 to 22; p. 157, line 3, etc.). That he could not see anyone on the southerly side of the siding is plainly evident, for he says that after he had gone past the cars on the siding on his way east, and after he had seen Pruner go through the space between the cars to the south side of the siding, he did not see him again until he appeared at the east end of the five empty cars standing on the siding (p. 152). In other words, though he stated he watched the siding he could not see

Pruner, who, he says, was on the south side of the siding, until he appeared at the end of the five empty cars nearest the witness. Further proving that he could not see to the south of the siding he testifies that the very object of having Pruner get off where he did was so that *Pruner* could make sure that no people were in the driveway near the cars (p. 160).

Pruner, the rear brakeman, states that as his train proceeded eastwardly, he jumped off and ran through the space between the five empty cars and the two coal cars. He looked both ways along the switch, but tarrying not a minute, and ran up to the switch point (a distance of 420 feet), turned the switch, ran across to the north side of the switch, gave the signal to back up, and ran westerly on the north side of the switch. He states that he saw no children on the southerly side of the siding (pp. 192, 193, 196) as he looked while on the south side of the siding; when he ran back on the north side of the siding he could not see the westerly end of the same on the south side (p. 196). The statement in defendant's brief (p. 35) that as Pruner ran back along the east bound track *he could see to the end of the siding* is misleading. While it is true that he could see to the end of the siding on the *north* side, he could not see to the south side of the siding at all. These are the only witnesses for the defendant testifying in any manner as to whether there were any children on the south side of the switch or not.

Defendant contends that the whole testimony presents no disputed question of fact bearing on the question of defendant's negligence. That there existed no evidence of negligence on the part of the servants of defendant. That all the crew of

the train were in their proper places, and both the conductor and rear brakeman looked to see if there were any persons near the sides of the siding or switch who might be injured, and *saw none.* That under such circumstances, there was no negligence, and therefore the Court should have directed a verdict for the defendant.

It is a well known principle of law that a motion to direct a verdict for defendant based upon insufficiency of evidence to establish a cause of action admits the truth of the plaintiff's evidence, and every inference of fact which can be legitimately drawn therefrom.

Jones v. Public Service Ry. Co., 86 N. J. L., 646;
Fox v. Atlantic & C. Co., 84 N. J. L., 726;
Dallas v. Sea Isle City, 84 N. J. L., 679.

It is also well settled that a Court should direct a verdict for a defendant *only* where the facts are such that *all* reasonable men must draw the *same* conclusion from them, to wit, that no facts from which negligence might be inferred had been proven. If fair minded men, from the facts admitted, or conflicting testimony given may honestly draw different conclusions as to the existence of negligence, the question is not one of law but of fact, and to be settled by the jury under proper instructions.

Richmond, &c., R. R. Co. v. Powers, 149 U. S., 43; 37 L. Ed., 642;
McDermott v. Severe, 202 U. S., 600; 50 L. Ed., 1162.

The most that can be said of the testimony when the case closed, in favor of the defendant, was that there was a conflict of evidence from which

the jury were to determine the facts. It was then for the jury to determine whether they believed the plaintiff's (boy) story, that he and his little friend had been playing in the driveway near the tracks for about an hour, corroborated in part as it is, by the testimony of the witness, Kisler, that he saw the boys in the driveway near the track, but some distance further down toward the freight house, about five minutes before the accident, and by the testimony of three witnesses that immediately after the crash of the cars, they saw injured on the ground near the tracks, and the other little fellow standing near him, or whether they were to believe the testimony of the conductor and the rear brakeman that they looked and saw no children.

Many inferences of fact tending to establish negligence on the part of defendant, may legitimately be drawn from the evidence. The jury might have found that the conductor could not see along the southerly side of the standing freight cars as he approached from the west. It is open to question whether a man standing on the top of a car approaching a line of standing cars from the west, and being approximately ten feet to the north of the southerly side thereof, could see for any distance along the southerly side of the standing cars and within a few feet thereof. It was for the jury to say whether, in view of the conductor's statement that after the brakeman, Pruner, passed between the cars to the south side of the siding, he could not see him until he arrived at the east end of the five empty cars, the conductor could see along the south side of the siding *at all.* It was for the jury to determine whether the brakeman, running through a space between cars from north to south, and who says he looked to the right and

left, but not tarrying a minute, and who says he did not see children on the southerly side of the switch, *in view of the other testimony in the case that the children were in the driveway near the tracks,* actually did look, or if they believe he did look, whether such looking was not so cursory as not to disclose to him the children near the cars or in the driveway.

It was for the jury to say whether the witness Pruner was telling the truth when he said that he had seen the witness Kisler approaching the siding from the north and crossing the main line tracks (pp. 207, 208), and spoke to him saying, "What's on your mind now?" (p. 208), and that Kisler said, "Somebody's hurt on the other side of the train" (p. 208), and that thereupon Kisler walked through the space between the cars (p. 208), in view of the fact that Kisler had stated that he was on Bogart Avenue (which is south of the siding) selling produce, heard the scream of the boy, jumped over the fence into the driveway, saw the boy lying near the track and on the south side thereof, with his leg hanging off, picked him up and held him (pp. 30, 31) for about four minutes, and during that time saw no railroad man there, and hollered for his assistant to come and help him (p. 32).

It was for the jury to say whether the act of the witness, Pruner, in staying on the northerly side of the switch in a position where he could not see the driveway on the southerly side during the whole time the train was backing, was the act of a reasonably prudent and careful man.

It was for the jury to determine the credibility to be attached to the stories of all the witnesses and to believe that to which they attached credibility. It was for the jury to determine whether

if they found it to be a fact that children had for years played at this point, jumping on and off cars and running between them, even when switching operations were going on, to the knowledge of defendant's servants, the mere hasty glance in both directions given by the witness, Pruner, if given, was a sufficient exercise of care and diligence to protect the small children who might be playing at this point. Under such circumstances the difficulty of keeping small children away from the point being known to the defendant, the jury might find that other precautions were necessary. If the jury believed the testimony of the plaintiff (boy) to the effect that he and the other little fellow had been playing in the driveway at or near the switch for about an hour prior to the accident, they might in view of the fact that the station and freight house of defendant in which were employees of defendant' was near the switch and on the same side thereof as the driveway, infer that defendant either knew of the presence of the boy, or under the circumstances, should have known such fact and to have given him warning of its intention to back in the train.

Defendant argues that when the brakeman looked, the boy *may* have been out of sight—hiding under the car or down by the freight house, *or* down close to the car, reaching under for his marble—and, therefore, invisible to the conductor or brakeman. But these are all inferences of fact to be drawn from the testimony, and inasmuch as all inferences of fact must be drawn by the jury and not by the Court, were for the jury, and therefore, there was no error in submitting the case to the jury.

While it may be true that in the Federal Courts a mere scintilla of evidence is not sufficient to

justify the trial court in submitting the question of negligence to the jury, we submit that the case at bar presented more than a mere scintilla of evidence as to the negligence of defendant.

The case of *Nappi v. Grand Trunk Ry.*, 99 Atl., 185 (N. H.), is not exactly similar to the case at bar. In the Nappi case there was no evidence as to when the injured boy went on the tracks nor where he was immediately prior to the accident—his presence there was not known to any one. In the case at bar, it is proven by the testimony of the boy that he had been playing in the driveway near the switch *for about an hour* before the accident, and Kisler states that he saw him in the driveway five minutes before the accident. Had there been such testimony in the Nappi case, the Trial Court would not have directed a verdict for defendant.

Defendant seems on this point to be arguing "weight of evidence" and "contributory negligence of boy plaintiff" instead of the presence or absence of sufficient testimony to require a submission of the case to the jury.

III.

There was no error in the charge of the Trial Court.

The portion of the charge complained of by the defendant is,

> "The evidence of the boy, on the other hand, is that he and his little companion had been playing marbles in about the same spot for upwards of an hour, before he was injured. Now, you would be justified, if you believe his testimony, in finding or inferring from it, that either the brakeman did not look, as he testifies that he did, or that his looking

was of such a cursory nature that he did not see these little boys, who, they say, were playing out in the driveway, but very close to one of the freight cars.

* * * * * *

"Now, then, the significance of that is this: if the boy's story is correct, that he just put his foot under and moved the marble, and then the train hit him, it must have been a very short period of time after he put his foot under before the train started moving back; and, if his story is believed, all the time prior to that he must have been out in full view. Therefore, he must have been out there, if you believe his story, at the time that the brakeman went through, unless it was he was actually hiding under the cars, or his story as to how long he was under there is not the true story. And, if you find that he was out there, you would be justified in finding that the brakeman did not look, or that his looking was not with the care that an ordinary prudent person would have exercised under those circumstances, who was endeavoring to ascertain the presence of anyone there, so as to avoid injuring that person by the movement of the train."

Defendant contends that the portion of the charge first above set out assumes that the boy was playing in the *same spot* all the time, and that in the portion of the charge secondly above set out, the Court assumes not only that the boy was playing in the same spot where the accident happened for an hour prior thereto, but that he was in plain sight throughout that whole period of time, and that such assumptions were erroneous, and therefore misled the jury.

The evidence of the boy as to his actions immediately prior and up to the happening of the accident is set forth on pp. 101 to 112 of the record. He had been playing marbles *by the switch* and

one of the marbles went under the car; he had not been on the track or under the car; he had been playing there for about one hour.

On cross examination he states that he had not *crawled* under the car, but that when his marble went under, he reached under with his foot so that he practically was under the car; that he "quick got out" and then reached for his marble with his foot when the train came back and ran over him.

Kisler, a witness, stated that he had seen the boys about five or ten minutes prior to the accident some distance from the point where the boy was injured. From this evidence defendant argues that plaintiff (boy) and his companion were not always in the *same spot* during the hour the boy claims to have been playing near the tracks, and that, therefore, the charge of the Court was erroneous, and misled the jury, to the prejudice of the defendant.

Defendant puts a too narrow construction upon the language of the Court. It cannot be contended that the Court intended the jury to believe that the boy plaintiff had not *moved* during the entire hour he was in the driveway. The boy had testified that he was playing marbles. It is common knowledge that boys do not stand absolutely still in one "spot" when playing marbles—they move about. The Court in using the language set forth, intended the jury to understand that the evidence of the boy plaintiff was that he and his little friend had been playing marbles *in the driveway* for upwards of an hour before he was injured. This is plainly evident from a reading of the paragraph. The Court immediately proceeds to instruct the jury that the evidence of *the boy* was that the boys had been playing "in the driveway" for upwards of an hour.

The Court did not instruct the jury that the boy had, in fact, been playing in the same spot for an hour before the accident. The Court distinctly instructed the jury that *the evidence of the boy* was to that effect, and that *if they believed* the testimony of the boy, they might make certain inferences.

In order to fully comprehend the second paragraph to which exception is taken, it will be necessary for us to examine the evidence. The Court had mentioned to the jury the evidence of the witness, Pruner, who stated that from the time he ran through the space between the cars and up to the switch and turned the same, a period of six minutes elapsed, and the testimony of the conductor that two minutes elapsed between the time the brakeman gave him the signal to back up and the impact of the train of twenty empty cars with the five empty box cars, so that there was at least eight minutes between the time the brakeman says he looked on the south side of the switch and the time the boy was injured.

Then follows the paragraph complained of.

The charge of the Court in no way limited the jury as to what they should find. The Court did not instruct the jury that they must believe any particular witness. It in no way misled them. It did not remove the testimony of Kisler from their determination. The story of the boy was plainly that he had been out in the driveway for about an hour prior to the accident; the story of Pruner, the brakeman, was that he looked both ways on the southerly side of the siding and could see clear to the freight house and saw *no one*—yet it is evident that even though the contention of the defendant that the injured boy might have been under the car when the brakeman

looked, be considered, the other little lad was there in the driveway, and Pruner did not see him. Defendant suggests that this lad *may* also have been under the car, but there is no evidence save that he was in the driveway. The injured boy says he was there: Kisler saw him there with injured plaintiff both before and after the accident, and Mrs. Farrell and Miss Farrell both saw him there immediately after the accident.

It can hardly be denied that *if the jury believed* the testimony of the plaintiff (boy) that he and his little companion had been playing in the driveway for an hour before the accident, and that he was under the car only long enough to enable him to reach the marble and pull it toward him and "quick got out," or that he just put his leg under, gave the marble a pull and then another pull, (which could not take but a very short period of time), and the train moved backward and cut off his leg he gave the second pull to the marble, they would be justified, in finding that the boys were out in full view of the brakeman at the time he says he looked "both ways." No other conclusion could, under such circumstances, be reached. Should the jury find these facts, then they would be justified in finding either that the brakeman did not look when he says he looked, or that his looking was so carelessly done as not to disclose to him that which was plainly obvious.

Righter v. Pennsylvania R. R. Co., 42 N. J. L. 180;
P. R. R. Co. v. Pfuelt, 60 N. J. L., 278;
Conklin v. Erie R. R. Co., 63 N. J. L., 343;
Brady v. Consolidated Trac. Co., 64 N. J. L. 375;

Van Riper v. N. Y. S. & W. R. R. Co., 71 N. J. L., 348;
Stetson v. B. & N. Y. Ry. Co., 77 N. J. L. 121.

THERE WAS NO ERROR IN THE CHARGE OF THE COURT.

IV.

The Court did not err in refusing to direct a verdict in favor of the defendant on the ground that there was no evidence of wilfull or wanton negligence on the part of defendant or any of its servants.

Defendant argues that the plaintiff (boy) was on the property of the defendant at the time ot the injury to him, and, therefore, a trespasser, and defendant owed him no duty save to refrain from wilfully or wantonly injuring him, and, therefore, the Court should, upon motion duly made, have directed a verdict for defendant; that the Court, instead of doing so, charged the jury that defendant owed to the boy the duty of exercising reasonable care.

Defendant alleges that none of its servants *knew* of the presence of the boy in a dangerous position when the cars were moved, or even that the boy was on defendant's property, and there was nothing to show wilfull or wanton negligence.

Defendant did know that very small children—as young as 3 and 5 years old were accustomed to play near the cars and between them on this siding. It knew that this was being done even when switching operations were going on (pp. 25, 43, 47, 64, 179). It knew that by sending this long train of heavy cars with violence against

the standing cars, they would be moved quickly and violently. Under such circumstances, it was for the jury to say whether the precautions taken by defendant to prevent injury to children who might be playing near the tracks, were proper or not. Under such circumstances, the jury might find that the failure to take proper precautions to prevent injury to such children, amounted to gross negligence.

Furthermore, it was not for the Court to declare plaintiff (boy) incapable of recovering upon the ground that he was a trespasser. The boy was 6½ years of age. At this age, many Courts, including this Court, have held a child to be incapable of becoming a trespasser. Cases for this point on page following

Newman v. Railroad Co., 52 N. J. L., 446;
Schneider v. Winckler, 74 N. J. L., 71 at p. 73;
Chicago v. Starr, Adm., 42 Ill., 174;
Walbridge v. Schuykill Electric Co., 190 Pa. St., 274;
Chicago &c. R. Co. v. Wilcox, 138 Ill., 370, 27 N. E., 899;
Central Trust Co. v. Wabash &c. R. Co., 31 Fed., 246;
Johnson v. N. K. Fairbank Co., 156 Ill. App., 381;
Indianapolis Trac. Co. v. Croly, 96 N. E. Rep., 973;
Danna v. Monroe, 129 La., 138;
Johnson v. Bay City, 164 Mich., 251;
Pass Christian v. Fernandez, 100 Miss., 76;
Dorr v. Atlantic Shore Line R. Co., 76 N. H. 160; 80 Atl., 366;
Ruehl v. Lidgewood Rural Tele. Co., 135 N. W., 793;

These cases should appear on P. 44 under point V.

Snare & Triest Co. v. Friedman, 169 Fed., 1;
Swiderski v. Erie R. R. Co., 197 Fed., 521;
Chesko et al v. Delaware & Hudson Co., 218 Fed., 804.

In the case of *Snare & Triest Co. v. Friedman,* supra, a child of 4½ years of age was playing in a public street upon some iron beams placed there by the defendant; the beams fell on her. Defendant claimed she was a trespasser and not entitled to recover. This Court said:

> "Plaintiff at the time of the accident was only 4½ years old. That there can be no question that in the eyes of the law, by reason of her age, she lacked that discretion which would make her responsible for her conduct. She was legally incapable of contributory negligence, or of being a trespasser."

In the case of Swiderski, supra, a child between the age of 7 and 8 years, was playing about some disconnected freight cars which were standing on a main freight siding of defendant, lawfully located on Twelfth Street, Jersey City. This main had two spurs leading into the premises of private warehouses on each side of the street. Plaintiff, with other children often played under and about the freight cars standing on the tracks, to the knowledge of the employes of the defendant. On a certain day, an engine and cars were pushed on to one of the spurs and against a car or cars under or near which plaintiff was playing, injuring her quite badly. Upon an action being brought to recover damages for such injuries, defendant pleaded, first, that the plaintiff was a trespasser and was therefore barred from a recov-

ery, by virtue of Sec. 55 of the General Railroad Law of New Jersey (3 Comp. Stat. p. 4245), and secondly, that, if not barred by the statute, plaintiff was a licensee for whose injury through defendant's negligence the latter was only answerable if such negligence was wanton and wilful.

This Court in its opinion (see pages 524 of the report) said:

> "As to the second question, that treating the plaintiff as a licensee the defendant was under the law of New Jersey only liable in case of wanton or wilfull injury. This question is settled in this Court by *Snare & Triest C. v. Friedman,* 169 Fed., 1, 8 (94 C. C. A., 369), where we held that an immature child could not by reason of tender age, be charged with contributory negligence, or with being a trespasser. It follows, therefore, that the Court below was right in refusing the defendant's point which sought to relieve the defendant from its negligence which resulted in the loss of the child's limb, because such injury was not wantonly or wilfully inflicted."

In the case of *Chesko v. Delaware & Hudson Co.,* supra, this Court said, at page 806 of the report:

> "As the injured lad was but six years old at the time, we may say, as we did in *Snare & Triest Co. v. Friedman,* 169 Fed., 1.
>
> "In the case before us it is not necessary to consider at what age an infant may be of such discretion as to be responsible in a case like the present for contributory negligence or for conduct which, in case of sufficient discretion, would make him or her a trespasser."

Under the decisions, therefore, of this Court, plaintiff in the case at bar was incapable of be-

ing guilty of contributory negligence or of being a trespasser.

Even should the Court hold plaintiff (boy) was *technically* a trespasser, still under the principle laid down in the case of *Snare & Triest Co. v. Friedman,* supra, *Swiderski v. Erie R. R. Co.,* supra, and *Chesko v. Delaware & Hudson Co.,* supra, the Trial Court did not err in refusing to direct a verdict for defendant. The child was of very tender years (6½) years. In the *Snare & Triest* case, this Court said:

> "We think in reason and in consonance with legal principles by which the duty of individuals to protect others from the dangers that may result from the use of their own property is determined, and by which they are held responsible for their negligent acts in that regard, this defendant owed a duty to the children of tender years, who, to its knowledge, were accustomed to play on the public streets in the vicinity of these piles of beams."

The Court then cites the case of *Railroad v. Stout,* 17 Wall. 657, 21 L. Ed. 745, with approval.

In the Swiderski case, supra, the Court approves the principle laid down in the Snare & Triest case. In the Chesko case, supra, the Court does likewise.

Defendant attempts to distinguish the case at bar from the cases of *Snare & Triest Co. v. Friedman,* and *Erie R. R. Co. v. Swiderski,* supra, by pointing out that in both of these cases, the accident happened on a public street. This Court, however, in the Snare & Triest case, said:

> "Why should not one who has a dangerous structure or appliance, *whether on his own land, or lawfully on the public highway,*

> use ordinary care to protect, not only those who are able to protect themselves by the use of their faculties, and are bound to make such use of them as the ordinary experience of mankind justifies us to expect, but also those of such tender years, as may without fault on their part, come within the danger to which the owner of such appliance or structure has exposed them."

In the Swiderski case, defendant (which was the same defendant, defended by the same counsel as in the case at bar) treated the premises as private property because it urged the application of Sec. 55 of the General Railroad Law of New Jersey (3 Comp. Stat. p. 4245), which is only applicable to cases where the person injured was injured on railroad tracks or private property.

THE COURT DID NOT ERR IN THE RESPECT ALLEGED UNDER THIS POINT.

V.

The Court did not Err in Refusing to Direct a Verdict for Defendant on the Ground that the Evidence Showed that the Boy Plaintiff was Guilty of Contributory Negligence as a Matter of Law.

Plaintiff was six and a half years of age. Whether an infant under the age of seven years can be legally guilty of contributory negligence has never been definitely settled by the Court of Errors and Appeals of the State of New Jersey. In the case of *Newman v. Railroad Co.*, supra, and *Schneider v. Winckler*, supra, the Supreme Court of New Jersey held that such an infant was legally incapable of being guilty of contributory negligence.

In the case of *Baker v. Public Service Railroad Co.*, 79 N. J. L. 249, the Supreme Court of New Jersey held that there exists a presumption that a child under seven years of age is not guilty of contributory negligence, which presumption might be overcome by proof on the part of the defendant.

In the case of *David v. West Jersey, etc. Ry. Co.*, 84 N. J. L. 684, the Court said:

> "The alleged negligence of decedent was not a court question. He was but ten months beyond the age of seven years, the age below which some cases hold children are presumed to be not guilty of contributory negligence (*Baker v. Public Service Railway Co.*, 50 Vroom, 849) and in others non sui juris as a matter of law, and hence not chargeable with contributory negligence (*Schneider v. Winckler*, 45 Vr. 71). See also, the exhaustive note in 17 Ann. Cas. 353. In the present case it is unimportant whether as an academic question the courts can properly hold that an infant of a given age is, as a matter of law, non sui juris, or whether that question is one of fact. There has been a time in the life of every person of mature judgment, as all agree, when he was incapable of exercising the care and judgment necessary to avoid and avert danger and was non sui juris. There is a time, also, when he is in law an adult and responsible as such. Between these two periods is a transition stage during which his responsibility depends upon matters of fact."

It will thus be seen that the Court of Errors and Appeals of the State of New Jersey has not passed directly upon the question as to whether an infant under seven years of age can be legally guilty of contributory negligence. It would, however, appear that although the Court

in the David case did not directly decide that point, the Court does recognize three periods during which a human being may or may not be guilty of contributory negligence.

(a) A period when he cannot be held capable of being guilty of contributory negligence;

(b) a period when he is in law an adult and responsible as such, and

(c) a transition period when he may or may not be guilty of negligence.

The Court recognizes a period when an infant cannot be held capable of being guilty of contributory negligence. When such period ends, the Court does not definitely state, but, considering that the Court does recognize the existence of such a period, it is but fair to assume that the Court would, if deciding the point, decide in favor of the rule existing in this Court, to wit, that an infant under the age of seven years is incapable of being guilty of contributory negligence.

The matter is settled, however, in this Court by the cases of *Snare & Triest Co. v. Friedman,* supra; *Swiderski v. Erie Railroad Co.,* and *Chesko, et al. v. Delaware & Hudson Co.,* supra.

The Court could very properly, we submit, have charged the jury that the infant was legally incapable of being guilty of contributory negligence. The Court, however, submitted such question to the jury. That the Court committed no error in so doing as against defendant, is beyond dispute.

The testimony which defendant alleges established, beyond dispute, the contributory negligence of plaintiff (boy) is, of course, an extract from the full testimony of the boy. Defendant

argues that such testimony shows that the boy knew it was dangerous for him to place any part of his body under the car and that he would be injured if the car moved while he was so doing, and that he thought the car was going to be moved, and that it was to avoid the possibility of being "all smashed to pieces" by crawling under the car or of losing his hand by reaching under the car with his hand, that he placed his foot under the car.

In order for us to determine whether it so clearly appeared by the testimony of the infant that he was so guilty of negligence as to bar a recovery, let us examine all the testimony bearing on this aspect of the case. He had never played on or near the siding or around the cars before. He had never been there in the driveway, or near the switch before, nor had he ever been chased away from there. This was the first time he had ever gone there (p. 104 ll. 8 to 10). He had never seen railroad cars going back and forth on the siding before (p. 106 l. 10). He was not familiar with the drilling of cars thereon, never having seen switching done on this track (p. l.); he did not know there was any engine or train nearby, he saw no railroad men; he did not know switching was going on; he did not know of the intention of defendant to move the cars he was playing near. He stated that he knew if he was run over by a car he would be hurt. He then says that when his marble rolled under the car it went away over to the other side, and that he then reached under with his leg and pulled it toward him, and that in doing so, he went under the car up to a certain point on his body and "quick got it out." Then follows (p. 108 l. 31 to p. 111 l. 9):

"Q. Why were you scared to reach your hand? A. It is harder for me when I get my hand off.

"Q. Why weren't you scared you might get your foot off, that would be worse than getting your hand off, wouldn't it? A. Yes, ma'am.

"Q. Well, why were you scared about your hand and not about your foot? A. Well, I might, you know, when I go to work, when I grow big then I will have a stiff hand and then I won't be able to work.

"Q. Were you afraid your hand would get run over? A. Yes.

"Q. What made you afraid that your hand would get run over? A. I don't know.

"Q. You were afraid the car might move and run over it, weren't you? A. Yes, sir.

"Q. That's right, isn't it? A. (Nods yes.)

"Q. And you thought you would rather have your foot run over than your hands, is that it? A. Yes, sir.

"Q. Well, why did you think your hand might be run over? A. I don't know.

"MR. GREENSTONE: If your Honor please, he has already answered the question twice.

"THE COURT: I think I will let him answer that.

"Q. Why did you think your hand might be run over? A. I don't know.

"Q. What? A. I don't know.

"Q. Why didn't you crawl under the car and reach it with your hand, reach this marble with your hand instead of with your foot? A. I might get all smashed to pieces, that's what I thought.

"Q. You were afraid you might get all smashed to pieces if you went under the car? Well, you were under the car, weren't you, when you first went under to reach with your foot? A. Yes, ma'am.

"Q. Weren't you afraid you would get all smashed to pieces when you went under the

car at first? A. No, that was the second time, then I got afraid.

"Q. You got afraid the second time but you weren't afraid the first time, is that it? A. Yes, ma'am.

"Q. Why were you afraid the second time and not the first time? A. Because I thought the train was going to move right away then.

"Q. You thought the train was going to move right away? A. Yes.

"Q. And that's why you just stuck your foot under the second time instead of reaching way under the way you did the first time? A. Yes, sir.

"BY THE COURT:

"Q. What made you think, Eddie, the train was going to move right away? A. All the cars, Mr. Murphy took with his truck and some other truck came and took some of it out the other cars.

"Q. That's while you were there? A. Yes. Then they had to get some other cars and I was afraid of getting all smashed to pieces because I thought they was going to move right away to get the cars that's full in.

"Q. You thought the train was going to move right away? A. Yes, and get the other full cars instead of the empty cars.

"Q. And what made you think that the train was going to move right away? A. To get the empty cars away and get the full cars there.

"Q. Did you see any engine there? A. No.

"Q. Well, how did you think the train was going to move without an engine? A. Well, I thought they was going to go faster in back of them, I couldn't tell.

"Q. You knew that a train couldn't move without an engine, didn't you? A. Yes, ma'am.

"Q. And you didn't see any engine there? A. No.

"Q. Did you or didn't you see the engine? A. I didn't see no engine at all.

"Q. Then why did you think the train was going to move? A. I don't know.

"Q. When you put your foot under the train were you afraid that your foot would get hurt? A. No.

"Q. Why weren't you afraid your foot would get hurt when you put it under the train? A. Because I can pull it out quicker."

The testimony discloses, without doubt, the simple, immature mind of the boy. In answering the Court and Counsel he used the words "Yes, ma'am." He argues that, knowing that if the car ran over him he would be hurt, he was "scared" to put his hand under because if his hand was injured "it would be harder for me to get my hand off" because "when I go to work, when I grow big, then I will have a stiff hand and then I won't be able to work" (p. 109 ll. 1 etc.). Again when asked why he was afraid he would get his hand run over, he answers "I don't know." Counsel then shrewdly suggests the answer by saying, "You were afraid the car might move and run over you, weren't you," to which the child answers "yes." Again counsel asks him why he thought his hand might be run over, and again the child answers "I don't know" (p. 169 ll. 15 &c.). He says the reason he did not "crawl" all the way under the car was because he might get "all smashed to pieces," although he was under the car and was not afraid the first time (p. 109 ll. 28 &c.) but got afraid the second time (p. 109 l. 34) and became so afraid because he thought the cars might move right away, although he had seen no engine and knew the train could not move without an engine, and that he did not know why he thought the train was going to move (p. 110 ll. 29 &c.; p. 111 l. &c.). He then says when he put

his leg under the car he was not afraid his foot would get hurt because "he could pull it out quick" (p. 111, ll. 5 &c.).

Were we to take isolated questions and answers from the testimony of the boy, it might seem as though the boy knew the dangers of the situation, yet a reading of his testimony on this point discloses that, while he might understand that if a railroad car ran over his foot or hand it would hurt him, he did not appreciate the dangers of the situation as it existed at the time of his injury.

There was, at least, testimony upon which the minds of reasonable men might disagree. The jury might find from the testimony of the child that he was not of sufficient mental capacity to fully appreciate the dangers of the situation. His age, his experience, his answers to questions put to him while on the witness stand, his demeanor and ability to understand were all matters properly belonging to the province of the jury.

The trial Court submitted the case to the jury for its determination as to the contributory negligence of the child. It committed no error as against defendant in so doing.

see cases on P. 33.

POINT VI.

The determination by this Court of the proper construction of Section 55 of the Railroad Act of New Jersey would not establish uniformity of decision.

Petitioner as its principal reason for the granting of the writ by this Court alleged that a decision by this Court would establish uniformity of decision upon the true meaning and intent of Section 55 of the Railroad Act. To this proposition we cannot accede.

It is settled doctrine that the Federal Courts will adopt and follow the decisions of the State Courts in the construction of their own constitution and statutes when that construction has been settled by the decisions of the highest tribunal.

Gage v. Pumpelly, 115 U. S. 454; 29 L. Ed. 449;
Clement v. Packer, 125 U. S. 309; 31 L. Ed. 721.

The only court in New Jersey which has construed Section 55 of the Railroad Act of that State is the Supreme Court of the State, in *Barcolini v. West Jersey Ry.* 82 N. J. L. 107, in which case a child strayed upon the railroad right of way at a place where its presence could not be anticipated. That court is not the highest tribunal in the State of New Jersey.

A determination of the question by this Court would not settle the same so as to avoid a conflict of decision between the State Courts and the Federal Court of Appeals and thus secure uniformity of decision.

Where the Federal Courts differ in their decisions upon the construction of the State statute from the decisions of the State Court relative thereto, the construction of the State Courts prevail,—provided such decision be that of the highest court of the State and the Federal Courts, including this Court, follow the State Courts in the construction of their constitution and statutes.

Clement v. Packer, supra;
Snare & Triest Co. v. Friedman, 169 Fed. p. 1;
Wade v. Travis County, 174 U. S. 508;
Sunset Telephone & Tel. Co. v. City of Pomona, 172 Fed. 835.

The construction of the statute placed thereon by the United States Circuit Court of Appeals in both the case of *Swiderski v. Erie Railroad Co.,* supra, and in the case at bar, is clearly in accord with the dictates of common sense and reason, and in accordance with the well-known policy of the State to protect its citizens of immature judgment and inexperience from dangers which beset them.

Finally.

The judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

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